100380

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

[redacted]

No. [redacted]30

KING COUNTY, WASHINGTON, APPELLANT,

vs.

SEATTLE SCHOOL DISTRICT No. 1.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

(28,796)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 841.

KING COUNTY, WASHINGTON, APPELLANT,

vs.

SEATTLE SCHOOL DISTRICT No. 1.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 29, 1922.

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Names and Addresses of Counsel.

MALCOLM DOUGLAS, Esq., Solicitor for Appellant,

431 County-City Building, Seattle, Washington.

HOWARD A. HANSON, Esq., Solicitor for Appellant,

431 County-City Building, Seattle, Washington.

HENRY W. PENNOCK, Esq., Solicitor for Appellee,

900 Leary Building, Seattle, Washington.

[1*]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and WILLIAM A. GAINES, Treasurer of King County, Washington,

Defendants.

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*Page-number appearing at foot of page of original certified Transcript of Record.

Amended Bill of Complaint.

To the Honorable Judge of the District Court of the United States for the Western District of Washington, Northern Division:

Seattle School District No. 1, King County, Washington, a municipal corporation of the State of Washington and having its principal office for the transaction of business in the city of Seattle, Washington, brings this its amended bill of complaint against King County, Washington, and William A. Gaines, Treasurer of King County, Washington, having their principal places of business in the city of Seattle, State of Washington, and thereupon the plaintiff complains and says:

I.

That the plaintiff is a School District duly organized and existing under and by virtue of the laws of the State of Washington.

II.

That the subject matter of this suit is a trust fund [2] created by Act of Congress and involves the construction of said Act of Congress.

III.

That the question involved herein is one of common interest to all School Districts in King County, Washington; that inasmuch as it would be impracticable to bring all of said School Districts before the Court, the plaintiff has brought this suit for and on behalf of itself and for and on behalf of all other School Districts in the said county who may elect to join with the plaintiff herein.

IV.

That under an Act of Congress approved March 4th, 1907 (Federal Statutes Annotated Sup. 1909, p. 665), the Secretary of the Treasury was directed to pay to the Treasurer of the State or Territory in which any forest reserve was situated, 10% of all moneys received by the United States from such forest reserve during any fiscal year including the year ending June 30th, 1906. It was further provided by said act that the money so paid to the State Treasurer be expended as the State or Territorial Legislature may prescribe, for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated; that by an Act of Congress approved May 23d, 1908, it was made the duty of the Secretary of the Treasury to pay to the State or Territorial Treasurer 25% instead of 10% of the amount received from forest reserves in any county or counties in such state, to be expended in the same manner as directed by the Act of March 4th, 1907. That by the same Act of May 23d, 1908, it was provided that when any forest reserve is in more than one state or territory or county, the distributive share to each from the proceeds of such forest reserve should be proportional to its [3] area therein.

That after the approval of said Act of Congress of March 4th, 1907, the Secretary of the Treasury remitted to the State Treasurer of Washington, annually, the proper proportional amounts of the proceeds of the sale of timber from the forest reserves within the State of Washington. That on

the 15th day of March, 1907, there was approved by the Governor of the State of Washington, an Act passed by the Legislature of said State directing the State Treasurer to turn over to the Treasurers of the respective counties within the forest reserve, the amount of money belonging to such county received from the Federal Government from such forest reserve, in accordance with the Act of Congress aforesaid. The Treasurer was further authorized and required to obtain the necessary information to enable him to distribute the moneys in proportion to the area of the several forest reserves in the respective counties of the state; that by the same Act the County Commissioners of the respective counties to which the moneys were required to be distributed were authorized and directed to expend the same for the benefit of the public schools and public roads thereof and not otherwise.

V.

That King County, Washington, embaces a part of the Snoqualmie Timber Reserve and under said Acts of Congress the public schools and roads of said county were entitled to a ratable proportion of said proceeds based upon the proportionate area of said forest reserve in said King County; that the proportion was determined by the State Treasurer from year to year beginning November, 1908, to and including the year 1918; that said State Treasurer remitted to the Treasurer of of King County, the proportionate amount of said fund to which the schools and roads in said county were entitled; that the aggregate amount so remitted during the above

period [4] was the sum of Twenty Thousand One Hundred Six and 07/100 ($20,106.07) Dollars.

VI.

That upon the receipt of the several apportionments mentioned in Paragraph V hereof, the County Treasurer placed a part thereof in the County Road and Bridge Fund of said County and the remainder in the current County School Funds of the several School Districts in said County; the apportionments of said fund between the County Road and Bridge Fund and the County School District funds made by said Treasurer for the year 1908 to 1918, inclusive, is shown in the following table:

Year	Total Received.	Apportioned to Road and Bridge Fund.	Apportioned to County Sch. Fd.
1908,	$367.56	$183.78	183.78
1909,	542.34	all	none
1910,	1334.34	all	none
1911,	2762.14	all	none
1912,	4799.13	all	none
1913,	3256.95	all	none
1914,	3544.88	all	none
1915,	1617.03	all	none
1916,	905.80	452.90	452.90
1917,	1060.01	530.00	530.01
1918,	915.89	457.94	457.95
	20106.07	18481.43	1624.64

That of the total amount received by the County Treasurer from the year 1908 to and including the year 1918, there was placed in the Road and Bridge

fund the sum of Eighteen Thousand Four Hundred Eighty-one and 43/100 ($18,481.43) Dollars, and in the various County School District Funds the sum of Sixteen Hundred Twenty-four and 64/100 ($1624.64) Dollars.

VII.

That the County Commissioners of King County assumed to direct the County Treasurer in the apportionments made as aforesaid from the year 1908 to 1918, inclusive, but said Commissioners were without power or authority to make a division thereof or to exercise any discretionary control over the money so received [5] by the County Treasurer.

In this behalf plaintiff shows to the Court and alleges that the trust created by the aforesaid Acts of Congress required an equal division of said trust funds between the public schools and roads to be expended for their benefit as the legislature might direct; that the legislature of Washington by directing that all of such trust funds be turned over to County Treasurers and that they be expended for the benefit of the public schools and roads, and not otherwise, thereby made such County Treasurers and the respective counties to whom and to which such trust fund was remitted, custodians and trustees of said fund; that said Trustees had no power to apportion to the road fund of the county a greater sum than that apportioned to the school fund and the misappropriation of said fund by the County Treasurer and by the County of King as stated in Paragraph VI hereof, constitute a breach

of the aforesaid trust, whereby the plaintiff and other school districts of said county have been practically excluded from the benefits of said Acts of Congress; that said defendants have caused to be misappropriated in the manner above described the sum of Eight Thousand Four Hundred Twenty-eight and 40/100 ($8,428.40) Dollars, all of which should have been expended for the benefit of the public schools of King County and should not have been placed to the credit of the road and bridge fund thereof.

VIII.

That the actual attendance of pupils in Seattle School District No. 1, also the total actual attendance in all the school districts in King County, from the year 1908 to and including the year 1914, is shown in the table marked Exhibit "A" hereto attached and made a part hereof. [6]

The plaintiff had no knowledge until the month of March, 1916, that the trust funds mentioned in paragraph VI had been received or misappropriated by the defendants.

In consideration whereof, and for as much as the plaintiff is without a speedy or adequate remedy, save in a court of equity, the plaintiff prays that this Honorable Court issue its writ of subpoena in due form of law directed to the said John A. Bennett, as Treasurer of King County, Washington and King County, State of Washington, commanding them at a certain day and under a certain penalty to be therein specified, to appear before this Honorable Court to answer all and singular the matters

and things hereinabove set forth and complained of, but the answers to the amended bill of complaint need not be under oath and answer under oath being hereby expressly waived:

And the plaintiff prays:

1. That the defendants, King County and William A. Gaines as Treasurer of King County, Washington, may be held and adjudged to be custodians and trustees of the moneys remitted as aforesaid by the State Treasurer of Washington to the Treasurer of King County, from the year 1908 to and including the year 1918.

2. That as trustee said defendants be required to render an accounting showing the receipts and disbursements and the disposition of all such moneys as well as the condition of the fund at this date.

3. That the plaintiff, Seattle School District No. 1 may have and recover of and from the defendant, King County, Six Thousand Seven Hundred Eighty-nine and 22/100 ($6,789.22) Dollars its proportionate share according to school attendance of the amount misappropriated by the defendant, King County.

4. That as an alternative to a general judgment against King County, the plaintiff, Seattle School District No. 1 be awarded a decree establishing the trust fund aforesaid and requiring the County of King as Trustee of said fund to make good to said Seattle [7] School District No. 1 the full sum of Six Thousand Seven Hundred Eighty-nine and 22/100 ($6,789.22) Dollars, with interest thereon at six per cent (6%) per annum from the date of the

decree in the manner following: That beginning with the year 1921, the said King County and the Treasurer of King County be directed to transfer to the account of Seattle School District in addition to its lawful proportion of the moneys received from the State Treasurer on account of the sales of timber from the forest reserve, the one-half portion thereof which would otherwise be payable to the road and bridge fund of said county and that said King County and its Treasurer in each and every year thereafter make like disposition of said trust fund until Seattle School District No. 1 shall have received in addition to its regular proportion of said fund the sum of Six Thousand Seven Hundred Eighty-nine and 22/100 ($6,789.22) Dollars with interest as aforesaid.

5. That plaintiff may recover its costs in this suit and that plaintiff may have such other and further relief as the nature and circumstances of the case may require and as to this court may seem just and equitable.

HENRY W. PENNOCK,
Attorney for Plaintiff. [8]

United States of America,
Western District of Washington,
Northern Division,—ss.

Reuben W. Jones, being first duly sworn, on oath deposes and says: That he is Secretary for the plaintiff, Seattle School District No. 1; that he has read the foregoing amended bill of complaint and that the statements and allegations contained in said

amended bill are true.

REUBEN W. JONES.

Subscribed and sworn to before me this 26th day of March, 1921.

[Notary Seal] BERTHA F. BARTEL.

Notary Public in and for the State of Washington, Residing at Seattle.

Copy of within received Mar. 26, 1921.

MALCOLM DOUGLAS,
Prosecuting Attorney. [9]

Exhibit "A."

	Seattle School Dist. No. 1—Actual Attendance.	All School Districts—Actual Attendance.
1908	4,582539	5,751,595
1909	4,798,158	5,677,116
1910	5,363,122	6,746,868
1911	5,764,785	6,945,466
1912	5,887,588	7,211,837
1913	6,160,116	7,652,808
1914	6,704,976	8,364,344

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and JOHN A. BENNETT, Treasurer of King County, Washington,

Defendants.

Stipulation Substituting Wm. A. Gaines for John A. Bennett as Defendant.

IT IS HEREBY AGREED AND STIPULATED by and between the respective parties hereto, by their attorneys of record, that William A. Gaines, the duly elected, qualified and acting Treasurer of King County and the successor in office of John A. Bennett, formerly Treasurer of King County, may be substituted for the said John A. Bennett as one of the defendants in the above-entitled action.

Dated this 18th day of October, 1920.

HENRY W. PENNOCK,
Attorney for Plaintiff,
FRED C. BROWN,
HOWARD A. HANSON,
Attorneys for Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

United States District Court, Western District of Washington. Northern Division.

No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and JOHN A. BENNETT, Treasurer of King County, Washington,

Defendants.

Motion to Dismiss.

Come now King County and John A. Bennett, Treasurer of King County, defendants above named, and move the Court to dismiss the bill of complaint in the above-entitled action upon the following grounds:

I.

That it appears from the face of said bill of complaint that the said plaintiff has a complete and adequate remedy at law, and that there is no ground for the interposition of a court of equity.

II.

That it appears from the face of said bill of com-

plaint that the Court has no jurisdiction of the subject matter of said action.

III.

That the said bill of complaint does not state facts sufficient to constitute any ground for relief.

IV.

That there is a defect in parties plaintiff in the above-entitled action. [12]

V.

That there is a defect or nonjoinder of parties defendant in the above-entitled action, because the Board of County Commissioners of King County has not been joined as a party defendant.

ALFRED H. LUNDIN,
FRANK P. HELSELL,
Attorneys for Defendants.

Copy of within motion received and due service of same acknowledged this 2d day of Jan. 1919.

HENRY W. PENNOCK,
By ARG,
Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 29, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and in Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and JOHN A. BENNETT, Treasurer of King County, Washington,

Defendants.

Supplemental Motion to Dismiss.

Come now King County and William A. Gaines, Treasurer of King County, defendants herein, and supplementing the defendants' motion to dismiss now move the Court to dismiss the bill of complaint in the above-entitled action, upon the following supplemental grounds:

I.

That it appears from the said bill of complaint that the plaintiff has no legal capacity to sue.

II.

That it appears from the face of said complaint that the Court has no jurisdiction of the parties to said action, or either of them.

FRED C. BROWN,
HOWARD A. HANSON,
C. E. CLAYPOOL,
Attorneys for Defendants. [14]

Copy of within motion received and due service of same acknowledged this 24th day of November, 1920.

PENNOCK & GATES,
Per A. BOYD,
Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 20, 1920. F. M. Harshberger, Clerk. By S. E. Lietch, Deputy. [15]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and in Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and JOHN A. BENNETT, Treasurer of King County, Washington,

Defendants.

Stipulation That Supplemental Motion to Dismiss be Considered as Part of Motion to Dismiss.

IT IS HEREBY AGREED AND STIPULATED by and between the respective parties hereto, by their respective attorneys of record, that defendants' supplemental motion to dismiss may be

considered and determined by the above-entitled court as a part of the motion to dismiss herein.

Dated this 18th day of November, 1920.

HENRY W. PENNOCK,
Attorney for Plaintiff.
FRED C. BROWN,
HOWARD A. HANSON,
C. E. CLAYPOOL,
Attorneys for Defendants.

Due service of the within stipulation acknowledged and receipt of copy thereof admitted this 24th day of Nov. 1920.

PENNOCK & GATES,
Per A. BOYD,
Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1921. F. M. Harshberger, Clerk. By S. E. Lietch, Deputy. [16]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and WILLIAM A. GAINES, Treasurer of King County, Washington,

Defendants.

Order Overruling Motion to Dismiss.

This cause came on to be heard on this 11th day of July, 1921, upon the defendants' motion and supplemental motion to dismiss the amended bill of complaint, Henry W. Pennock appearing as counsel for the plaintiff and Howard A. Hanson appearing as counsel for the defendants, upon consideration whereof it is

ORDERED that the motion and supplemental —— of the defendants to dismiss the amend bill of complaint be and the same is hereby overruled; to which ruling the defendants duly excepted and their exceptions are allowed.

Thereupon the defendants, by their counsel, in open court, declined to plead further; and the plaintiff, in open court, moved for the entry of an order that the amended bill of complaint be taken *pro confesso,* which motion the court sustained.

Exception of defts. noted.

Done in open court this 11th day of July, 1921.

JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and WILLIAM A. GAINES, Treasurer of King County, Washington,

Defendants.

Stipulation Waiving Provisions of Decree as to Payment of Receipts of Forest Moneys.

IT IS STIPULATED by and between the parties hereto by their respective counsel that defendants' motion to dismiss and supplemental motion to dismiss the bill of complaint herein shall apply to the amended complaint and that the Court having overruled defendants' motion and supplemental motion to dismiss the amend complaint and the defendant having refused to plead further to said amended complaint, and the Court having determined this cause in favor of plaintiff as upon default, the defendants hereby waive any objection or exception to which they might be entitled, or which they might take, to the particular provision of the decree which permits the judgment in favor of the plaintiff to be paid from future receipts from the United States Forest Re-

serve Fund instead of from the County General Fund.

The stipulation shall be without prejudice to the right of the defendant, which is hereby reserved, to make any and every other objection and exception to the decree to which it may be entitled either in law or equity.

Dated this 30th day of March, 1921.

HENRY W. PENNOCK,
Attorney for Plaintiff,
MALCOLM DOUGLAS,
HOWARD C. HANSON,
Attorneys for Defendant. [18]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18½]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiffs,

vs.

KING COUNTY and WILLIAM A. GAINES, Treasurer of King County, Washington,

Defendants.

Stipulation Waiving Thirty Day Rule.

IT IS STIPULATED, by and between the parties hereto, by their respective counsel, as follows.

For the purpose of expediting the final determination of this cause, the defendants hereby waive the provision of the rule of court requiring thirty days to elapse after the entry of an order that the bill be taken *pro confesso* before the entry of a final decree.

The defendants further acknowledge receipt of a form of final decree, based upon the default of the defendants, containing a provision permitting the judgment in favor of the plaintiff to be paid from future receipts from the Federal Reserve Fund instead of from the County General Fund. The defendants hereby waive any objection or exception to which they might be entitled or which they might take to the particular provision of the decree last above mentioned.

This stipulation shall be without prejudice to the right of the defendants, which is hereby reserved, to make any and every other objection and exception to the decree to which they may be entitled either in law or in equity.

Dated this 11th day of July, 1921.

HENRY W. PENNOCK,
Attorney for Plaintiff.
MALCOLM DOUGLAS,
HOWARD A. HANSON,
Attorneys for Defendants. [19]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiffs,

vs.

KING COUNTY and WILLIAM A. GAINES, Treasurer of King County, Washington,

Defendants.

Decree.

This cause came on for final hearing on the 11th day of July, 1921, upon the amended bill of complaint and upon the stipulation of the parties hereinafter referred to, Henry W. Pennock appearing as counsel for plaintiff and Howard A. Hanson appearing as counsel for the defendants.

And the Court having overruled defendants' motion and supplemental motion to dismiss the amended bill of complaint and having ordered that the amended bill of complaint be taken *pro confesso,* and the parties having stipulated for a final decree

on this date, waiving the thirty-day provision of Equity Rule 17, the Court finds as follows:

That each and all of the allegations of the amended bill of complaint have been confessed by the defendants and that the same are true. That by the Acts of Congress approved March 4, 1907, and May 23, 1908, set forth in the amended bill of complaint, a trust was established for the benefit of the public schools and of the public roads in each county of the State of Washington wherein timber had been, or should be, sold from the forest reserves; that it was the intention of Congress in creating the trust that the public schools and the public roads should equally share the benefits of such fund. That the [21] defendant King County, through its officers and agents, in the years 1909 to 1915, both inclusive, caused the entire amount of said trust fund to be appropriated to the public roads of King County, and no part thereof was appropriated for the benefit of the public schools. That said defendant and its officers during said years misappropriated for public road purposes Eight Thousand Four Hundred Twenty-eight and 40/100 Dollars (8,428.40), which under the Acts of Congress should have been expended for the benefit of the public schools of King County. That Seattle School District No. 1 would and should have received as its proportion of the amount so misappropriated, based upon the actual school attendance within said school district, the sum of Six Thousand Seven Hundred Eighty-nine and 22/100 Dollars ($6,789.22). That the plaintiff is entitled to a

judgment against the defendant King County for the last named amount.

WHEREFORE, IT IS ADJUDGED AND DECREED that the plaintiff, Seattle School District No. 1, have and recover of and from the defendant King County the sum of Six Thousand Seven Hundred Eighty-nine and 22/100 Dollars ($6,789.22), with interest from this date at the rate of six per cent per annum, and for the costs of this action.

The Court finds that the defendant William A. Gaines, acting as Treasurer of King County, was not personally responsible for the misappropriation of any of the Forest Reserve Trust Fund and said defendant is retained in this cause and made party to this decree for the purpose of carrying out the final provisions of this decree.

A stipulation of the parties hereto was filed in this cause on the 18th day of April, 1921, and offered in evidence by the plaintiff, by the terms of which the defendants have waived all objections to the following special provisions for the collection of the amount adjudged to be due the plaintiff by this decree, viz.: [22]

It is further ORDERED, ADJUDGED AND DECREED that the county of King and its treasurer and other proper officers, beginning with the year 1921, cause the trust fund derived from the sale of timber from the Federal Timber Reserve in said county to be administered as follows:

The one-half thereof which under the decision of the Court would normally be expended for the public roads shall be applied annually upon the judg-

ment in favor of the plaintiff until such time as the judgment and costs shall have been fully paid. The other one-half of such trust fund, normally to be expended for the public schools, shall not be affected by this order. The judgment entered herein shall be collectible only in the manner above directed and shall not be enforced against the general fund of the County of King, except in the event that the proper county officers shall fail to make payments on the judgment from the trust fund as installments shall be received by the County Treasurer. In the latter case the judgment for the balance remaining due thereon shall be enforceable by the usual process and proceedings applicable to judgments of this court.

To all of which defendants except, which exception is hereby allowed.

Dated July 11, 1921.

JEREMIAH NETERER,
United States District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and WILLIAM A. GAINES, Treasurer of King County, Washington,

Defendants.

Petition for Appeal.

To the Honorable JEREMIAH NETERER, District Judge:

The above-named King County feeling itself aggrieved by the decree rendered and entered in the above-entitled cause on the 11th day of July, A. D. 1921, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such cases made and provided.

Minnesota State Library,
St. Paul, Minn.

And your petitioner further prays that the [24] proper order relating to the security to be required of it be made.

MALCOLM DOUGLAS,
HOWARD A. HANSON,
Attorneys for King County.
431 County-City Building,
Seattle, Washington.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [25]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and WM. A. GAINES, Treasurer of King County, Washington,

Defendants.

Order Allowing Appeal.

On motion of Howard A. Hanson, Esq., solicitor and counsel for defendant King County, it is hereby ordered that an appeal to the United States Circuit

Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit. It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars ($500.00), the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated at Seattle, Washington, this 11th day of July, A. D. 1921.

JEREMIAH NETERER,
Judge. [26]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [27]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and WILLIAM A. GAINES, Treasurer of King County, Washington,

Defendants.

Supersedeas Order.

This cause coming on to be heard this 11th day of July, 1921, upon the application of defendant and appellant King County for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and said appeal having been allowed, it is ordered that the same shall operate as a supersedeas, as provided by law, and the clerk is hereby directed to stay the mandate of the District Court for the Western District of Washington, Northern Division, until the further order of this court.

Dated at Seattle, Washington, this 11th day of July, 1921.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [28]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and WILLIAM A. GAINES, Treasurer of King County, Washington,

Defendants.

Assignments of Error.

Now comes the defendant King County in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the 11th day of July, 1921.

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in denying the motion interposed by defendant and appellant King County to dismiss the amended bill of complaint filed in the cause.

II.

That the said District Court erred in denying defendant and appellant King County's supplemental motion to dismiss the amended bill of complaint filed in the cause. [29]

III.

That the said District Court erred in entering a decree in said cause in favor of complainant and against defendant and appellant King County.

WHEREFORE, the appellant King County prays that said decree be reversed and that said United States District Court for the Western District of Washington, Northern Division, be ordered to enter a decree reversing the decision of the lower court in said cause.

MALCOLM DOUGLAS,
HOWARD A. HANSON,
Attorneys for Appellant King County.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [30]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and WM. A. GAINES, Treasurer of King County, Washington,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, King County, a municipal corporation, as principal, and National Surety Company, a corporation duly organized under and by virtue of the laws of the State of New York and authorized to do surety business in the State of Washington, as surety, obligors, are held and firmly bound unto the above-named Seattle School District No. 1, a municipal corporation of the State of Washington, obligee, in the sum of Five Hundred Dollars ($500.00), to be paid to it, and for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our, successors jointly and severally firmly by these presents.

Sealed with our seals and dated the 11th day of July, 1921.

WHEREAS the above-named principal obligor, defendant, seeks to prosecute its appeal in the United States [31] Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in the above-entitled cause by the United States District Court, for the Western District of Washington, Northern Division,

Now, therefore, the condition of this obligation is such that if the above-named principal obligor, defendant, shall prosecute its appeal to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be

void; otherwise to remain in full force and effect.

KING COUNTY,
By CLAUDE C. RAMSEY,
Chairman of the Board of County Commissioners of King County, Washington.

[Corporate Seal] NATIONAL SURETY COMPANY,
By ROBERT WHYTE,
Attorney in Fact.

[Seal of Comrs. Court]

Attest: D. E. FERGUSON,
Clerk of the Board.
By J. W. Dutton,
Deputy.

The within bond is approved both as to sufficiency and form this 11th day of July, A. D. 1921.

NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [32]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and WM. A. GAINES, Treasurer of King County, Washington,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of record on appeal in the above-entitled cause, and include therein the following:

Amended complaint.

Stipulation re defendant Gaines.

Motion to dismiss complaint.

Supplemental motion to dismiss complaint.

Stipulation that supplemental motion to dismiss complaint shall be considered as part of motion to dismiss complaint.

Order overruling motion and supplemental motion to dismiss amended complaint.

Stipulation waiving provision of decree as to payment of receipts, of forest moneys.

Stipulation waiving thirty day rule.

Decree.
Petition on appeal.
Order allowing appeal.
Supersedeas order. [33]
Assignments of error.
Bond on appeal.
This praecipe.

MALCOLM DOUGLAS,
HOWARD A. HANSON,
Attorneys for Defendants and Appellants.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

MALCOLM DOUGLAS,
HOWARD A. HANSON,
Attorneys for Defendants and Appellants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 13, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [34]

United States District Court, Western District of Washington, Northern Division.

IN EQUITY—No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and WILLIAM A. GAINES, Treasurer of King County, Washington,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 34 inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal herein, from the judgment of said United States District Court for the Western District of Wash-

ington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the [35] above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return 73 folios at 15c	$10.95
Certificate of clerk to transcript of record, 4 folios at 15c	.60
Seal to said certificate	.20

I hereby certify that the above cost for preparing and certifying record amounting to $11.75 has been paid to me by attorneys for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 15th day of July, 1921.

[Seal] F. M. HARSHBERGER,
Clerk of United States District Court, Western District of Washington. [36]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 160.

SEATTLE SCHOOL DISTRICT No. 1, for Itself and on Behalf of All Other School Districts in King County,

Plaintiff,

vs.

KING COUNTY and WM. A. GAINES, Treasurer of King County, Washington,

Defendants.

Citation on Appeal.

United States of America,—ss.

To Seattle School District No. 1, a Municipal Corporation, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 10th day of August, A. D. 1921, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, from a final decree signed, filed and entered on the 11th day of July, 1921, in that certain suit, being In Equity No. 160, wherein you are the plaintiff and King County is defendant and appellant, to show cause, if any there be, why the decree rendered against the said appellant, as in

said order allowing appeal mentioned, should not be corrected and why [37] justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, United States District Judge for the Western District of Washington, Northern Division, this 11th day of July, 1921, and of the Independence of the United States the one hundred and forty-fifth.

[Seal] JEREMIAH NETERER,
United States District Judge for the Western District of Washington, Northern Division.

State of Washington,
County of King.

We, the undersigned attorneys of record for the plaintiff in the above-entitled action, hereby acknowledge due service of the above citation, this 11th day of July, A. D. 1921, and enter an appearance for the said plaintiff in the United States Circuit Court of Appeals for the Ninth Circuit.

HENRY W. PENNOCK,
900 Leary Bldg.,
Seattle, Washington,
Attorneys for Plaintiff. [38]

[Endorsed]: No. 160. In District Court of the United States for the Western District of Washington, Northern Division. In Equity. Seattle School District No. 1, for Itself, etc., Plaintiff, vs. King County and *John A. Bennett,* Treasurer of King County, Washington, Defendants. Citation on Appeal. Filed in the United States District

Court, Western District of Washington, Northern Division. July 11, 1921. F. M. Harshberger, Clerk S. E. Leitch, Deputy.

[Endorsed]: No. 3718. United States Circuit Court of Appeals for the Ninth Circuit. King County, Washington, Appellant, vs. Seattle School District No. 1, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed July 19, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed August 10, 1921. F. D. Monckton, Clerk.

No. 3718

United States
Circuit Court of Appeals
For the Ninth Circuit.

KING COUNTY, WASHINGTON,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT NO. 1, a Municipal Corporation,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the September Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City of Seattle, in the State of Washington, on Tuesday, the twentieth day of September, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge; The Honorable CHARLES E. WOLVERTON, District Judge.

No. 3718.

KING COUNTY, WASHINGTON,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,

Appellee.

Order of Submission.

ORDERED appeal in the above-entitled cause argued by Mr. Howard A. Hanson, counsel for the appellant, and by Mr. Henry W. Pennock, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel for the appellee to file additional authorities.

At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the ninth day of January, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert and William H. Hunt, Circuit Judges, and the Honorable Charles E. Wolverton, District Judge, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a Judgment or Decree be filed and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: * * * King County, Washington, Appellant, vs. Seattle School District No. 1, a Municipal Corporation, Appellee. No. 3718.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3718.

KING COUNTY, WASHINGTON,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,

Appellee.

MALCOLM DOUGLAS and HOWARD A. HANSON, for Appellant.

HENRY W. PENNOCK, for Appellee.

Opinion U. S. Circuit Court of Appeals.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge:

The controversy here grows out of the following situation:

By acts of Congress of March 4, 1907 (34 Stat. 1270), and May 23, 1908 (35 Stat. 260), it is provided that 25 per cent of all money received from each forest reserve shall be paid by the Secretary of the Treasury to the state or territory in which the reserve is situated, "to be expended as the State or Territorial legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated."

By an act of the Washington Legislature (Laws 1907, Chap. 185, p. 406), the State Treasurer is directed to turn over to the county treasurers the amounts of money belonging to the respective counties. By section 2, it is provided:

> "County commissioners of the respective counties to which the money is distributed are hereby authorized and directed to expend said money for the benefit of the public schools and public roads thereof, and not otherwise."

For the years 1909 to 1915, inclusive, the county commissioners of King County, Washington, directed the county treasurer to apportion the entire amount of such funds coming into his hands to the road and bridge fund, to the exclusion of the county school fund, and the county treasurer acted accordingly. Of the acts of the commissioners and the county treasurer in this regard, the plaintiff complains, and claims that the funds should have been apportioned to the road and county school funds in equal amounts. The sufficiency of the bill of complaint was challenged by a motion to dismiss. This was denied by the court below, resulting in a decree for plaintiff.

It may be premised that there is no apparent controversy touching the authority of the school district to sue and be sued. Indeed, by local statute, school districts in the state are constituted bodies corporate, possessing all the usual powers of a corporation for public purposes, and, among others, in name and style, to sue and be sued. § 4423,

1 Remington's 1915 Codes and Statutes of Washington.

Such school districts are regarded as mere arms of the state for the administration of its school system, and it is said that practically all of their functions are therefore governmental. Howard vs. Tacoma School District No. 10, 88 Wash. 167, 170.

The districts, however, are charged with the administration of the school funds entrusted to them by state authority, or to which they are entitled.

Much controversy has developed in the argument and in the briefs of counsel touching the particular style of trust relations existing between the parties, and out of this spring the questions whether the suit was properly instituted and whether a court of equity, and this, a federal court, have jurisdiction of the subject matter of the controversy.

It would be of little avail to discuss the distinction between private and charitable trusts. The one here involved cannot be strictly classed as either. It is a trust, public in its nature, but to be dealt with on like legal principles as pertain to private trusts. The general government has, by grant, apportioned certain funds to the several states or territories in which forest reserves are situated, to be expended as the state or territorial legislature may prescribe, for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated. These funds are transmitted to the state or territory entitled to them, and, under the direction of

the State Legislature of Washington, are turned over to the treasurers of the respective counties to which they are apportionable. The counties thereby become the trustees of the funds, acting through their treasurers, to be dispensed as directed under the grant. The local public, that is, the inhabitants of the school district, constitute the ultimate beneficiaries; but, in so far as the school districts are concerned, they are the immediate *cestuis que trustent* for the expenditure of the funds to which they are entitled. Furthermore, they are entitled, under the law, to have the money paid to them for their administration. Now, the school districts being constituted bodies corporate, with power to sue and be sued, what need is there for the interposition of the Attorney General to enable them to maintain suit to recover the funds from the trustee, so that they may administer them for the public benefit, as the law requires them to do.

In a general sense, if the Attorney General possesses and peculiar province in this country, it is to protect and safeguard the rights of the general public where there is no one in particular suffering injury more than another. But, as is said by the Court in People vs. Ingersoll, 58 N. Y. 14:

> "Doubtless the prerogatives of the Crown, except as affected by constitutional limitations, exist in the people as sovereign, but to what extent the exercise of this prerogative is committed to the public officials, either by the leg-

islature or the common law, is a question worthy of grave consideration, and not to be lightly decided, and should only be determined when necessary to a judgment and decision. * * * If there were no other remedy for a great wrong, and public justice and individual rights were likely to suffer for want of a prosecutor capable of pursuing the wrongdoer and redressing the wrong, the courts would struggle hard to find authority for the Attorney General to intervene in the name of the people."

But another principle is involved, which is, that the function of the Attorney General is to represent the public, the entire community, and not a limited portion thereof. An English case of much analogy to the present, and illustrative of the principle, is cited, namely, Attorney General vs. Garner and Another (1907), 2 K. B. 480. The suit was one instituted by the Attorney General on the relation of the Spaulding Rural District Council, to restrain defendants from depasturing certain lands. It was found that the Parish Council was the owner of the right of property as trustee for the parishoners, and not the Rural District Council, the relator, and the Court says:

"The question therefore arises whether in these circumstances the Attorney General can maintain the action, and obtain an injunction in respect of the wrongful acts of the defendants."

Answering the question, the Court says:

"The difficulty in the present case is to ascertain whether the Attorney General can interfere in a case where the interests involved are those, not of the whole community, but of a limited portion of it, such as the inhabitants of the parish . . . In my opinion it follows from these authorities that in the circumstances of this case the Parish Council might have maintained the action, and that if the Parish Council had been plaintiffs it would not have been necessary to join the Attorney General. As to that I have no doubt at all, but it does not decide the whole matter, for there remains the question whether the Attorney General may not be joined as a party to an action in a case in which it is not absolutely necessary that he should be joined. I find an almost complete absence of authority on that point, but, forming the best judgment that I can, it seems to me that the rights, which the Attorney General intervenes in order to protect, as representing the Crown, in the capacity, as it is stated in some of the cases, of *parens patriae*, must be rights of the community in general, and not rights of a limited portion of his Majesty's subjects, especially when the limited portion in question, the inhabitants of a parish, have representatives who can bring the action."

Here, as in the English case, we have a body

corporate, so constituted by statute, with power and authority to redress the wrong which it is alleged the particular community has suffered. There exists, therefore, in the present situation no occasion for the Attorney General's interposition for the relief of the general public.

Nor do we think this a matter between two sovereignties, that is, between the general government and the state of Washington, as is illustrated by the cases of Alabama vs. Schmidt, 232 U. S. 168; Emigrant Co. vs. County of Wright, 97 U. S. 339; and Emigrant Co. vs. County of Adams, 100 U. S. 61. The funds have passed from the Government, not only to the state, but into the hands of the county treasurers charged with the trust which Congress has impressed upon them. It is essentially a matter between the county and the school district, and presents the question whether the county commissioners may dispose of the funds in any other way than that in which Congress has directed that they shall be expended. The state has merely directed that the county commissioners shall expend the money in accordance with the terms of the grant or appropriation of the funds to the state.

The case is clearly one for equitable jurisdiction, as it involves a trust and alleged maladministration of trust funds.

It is further presented that this Court has no jurisdiction in the premises, as it is insisted that no federal question is involved. In this, we are

unable to concur. The very crux of the controversy depends upon a construction of the congressional grant or appropriation; that is, whether shall the funds be expended in equal shares for road and school purposes, or is it a matter discretionary with the state authorities? This undoubtedly presents a federal question. Such a question "is involved not merely when the construction of a federal statute incidentally arises, but when the case necessarily turns upon the construction of the federal laws, as when the plaintiff would be defeated by one construction, or successful by another." Hughes' Federal Procedure (2 ed.) 235.

The question which pertains to the proper construction of the grant remains. The funds are to be expended "for the benefit of the public schools and public roads." The use of the conjunctve would seem to indicate that at least not all of such funds should be expended for the one purpose or the other. But we concur with the Court below that the language should receive a like construction to that which obtains with the respect to wills, gifts and deeds, where property is bestowed upon or passed to two or more persons without defining the proportion in which they shall take; the presumption being that they shall take in equal portions.

See Lee vs. Wysong, 128 Fed. 833; Markoe vs. Wakeman, 107 Ill. 251, 261; Keuper vs. Mette, 239 Ill. 586; Gerting vs. Wells, 103 Md. 624; Campau vs. Campau, 44 Mich. 31; Hill vs. Reiner, 167 Mich. 400;

Bennett vs. Quinlan, 47 Mont. 247; Justice vs. Stringer, 160 Ky. 354; In re Helling, 147 N. Y. Supp. 799; In re Conner's Will, 39 N. Y. Supp. 900.

This results in affirmation of the decree appealed from, and such will be the order of the Court.

[Endorsed]: Opinion. Filed January 9, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3718.

KING COUNTY, WASHINGTON,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,

Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the de-

cree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered January 9, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3718.

KING COUNTY, WASHINGTON,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,

Appellee.

Petition for Appeal.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The above-named King County, feeling itself aggrieved by the decision rendered and entered in the above-entitled cause on the 9th day of January, A. D. 1922, does hereby appeal from said decision

to the Supreme Court of the United States for the reasons set forth in the assignments of error filed herewith and it prays that its appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decision was based, duly authenticated be sent to the Supreme Court of the United States, under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it be made.

MALCOLM DOUGLAS,
HOWARD A. HANSON,
Solicitors for Appellant.
431 County-City Building,
Seattle, Washington.

[Endorsed]: Petition for Appeal to Supreme Court U. S. Filed February 27, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3718.

KING COUNTY, WASHINGTON,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,

Appellee.

Assignments of Error.

Now comes the appellant King County in the above-entitled cause, and files the following assignments of error upon which it will rely upon its prosecution of the appeal in the above-entitled cause, from the decision made by this Honorable Court on the 9th day of January, 1922, affirming the decree of the District Court of the United States for the Western District of Washington, Northern Division, made and entered on the 11th day of July, 1921.

I.

That the United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the decree made and entered on the 11th day of July, 1921, by the District Court of the United States for the Western District of Washington, Northern Division.

II.

That the United States Circuit Court of Appeals for the Ninth Circuit, erred in not reversing the decree of the United States District Court of Washington, Northern Division, aforesaid, on account of error of the United States District Court for the Western District of Washington, Northern Division, in denying the motion interposed by defendant and appellant King County to dismiss the amended bill of complaint in the cause.

III.

That the United States Circuit Court of Appeals for the Ninth Circuit erred in not reversing the decree of the United States District Court of Washington, Northern Division, aforesaid, on account of error of the United States District Court for the Western District of Washington, Northern Division, in denying the supplemental motion interposed by defendant and appellant King County to dismiss the amended bill of complaint filed in the cause.

WHEREFORE, the appellant King County prays that said decree be reversed and that said United States Circuit Court of Appeals for the Ninth Circuit be ordered to enter a decision reversing the decree of the District Court of the United States for the Western District of Washington, Northern Division in said cause.

MALCOLM DOUGLAS,
HOWARD A. HANSON,
Solicitors for Appellant.

[Endorsed]: Assignment of Errors on Appeal to Supreme Court U. S. Filed February 27, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3718.

KING COUNTY, WASHINGTON,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,

Appellee.

Stipulation for Supersedeas Order.

IT IS STIPULATED AND AGREED by and between the parties hereto that the appeal of King County to the United States Supreme Court from the decision of the above-entitled court rendered on the 9th day of January, A. D. 1922, shall operate as a supersedeas and that the bond on appeal may be considered as sufficient for the purpose of supersedeas.

Dated at Seattle, Washington, this 23d day of February, 1922.

MALCOLM DOUGLAS,
HOWARD A. HANSON,
Solicitors for King County.
HENRY W. PENNOCK,
Solicitor for School District No. 1.

[Endorsed]: Stipulation for Supersedeas Order. Filed February 27, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

3718.

KING COUNTY, WASHINGTON,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,

Appellee.

Order Allowing Appeal.

On motion of Howard A. Hanson, Esq., Solicitor and counsel for appellant King County, it is hereby ordered that an appeal to the Supreme Court of the United States from the decision heretofore filed and entered herein, affirming a decree of the United States District Court, Western Division of Washington, Northern Division, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars ($500),

the same to act as a Supersedeas Bond and also as a bond for costs and damages on appeal.

Dated at San Francisco, California, this 27th day of February, A. D. 1922.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: Order Allowing Appeal to Supreme Court U. S. Filed February 27, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3718.

KING COUNTY, WASHINGTON,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,

Appellee.

Supersedeas Order.

This cause coming on to be heard on this 27th day of February, A. D. 1922, upon the application of appellant King County, for an appeal to the Supreme Court of the United States, and said appeal having been allowed and the parties having stipulated with respect to a supersedeas order, it is ORDERED that the appeal shall operate as a super-

sedeas, as provided by law, and the clerk is hereby directed to stay the mandate of the District Court for the Western District of Washington, Northern Division, and the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, until the further order of this court.

Dated at San Francisco, California, this 27th day of February, A. D. 1922.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]. Supersedeas Order. Filed February 27, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3718.

KING COUNTY, WASHINGTON,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,

Appellee.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That, we, King County, a municipal corporation,

as principal, and National Surety Company, a corporation duly organized under and by virtue of the laws of the State of New York and authorized to do surety business in the State of Washington, as surety, obligors, are held and firmly bound unto the above-named Seattle School District No. 1, a municipal corporation of the State of Washington, obligee, in the sum of Five Hundred Dollars ($500.00), to be paid to it, and for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our successors jointly and severally firmly by these presents.

Sealed with our seals and dated the 24th day of February, A. D. 1922.

WHEREAS the above-named principal obligor, appellant, seeks to prosecute its appeal in the Supreme Court of the United States to reverse the decision rendered in the above-entitled cause on the 9th day of January, 1922, affirming the decree of the District Court of the United States for the Western District of Washington, Northern Division, made and entered on the 11th day of July, 1921,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named principal obligor, appellant, shall prosecute its appeal to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall

be void; otherwise to remain in full force and effect.

KING COUNTY,
By CLAUDE C. RAMSAY,
Chairman of the Board of County Commissioners of King County, Washington.

[Seal] D. E. FERGUSON,
Clerk of the Board.
By J. W. DUTTON,
Deputy.

NATIONAL SURETY COMPANY.
[Seal] By ROBERT WHYTE,
Attorney in Fact.

The within bond is approved both as to sufficiency and form this 27th day of February, 1922.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: Bond on Appeal to Supreme Court U. S. Filed February 27, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3718.

KING COUNTY, WASHINGTON,
Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,
Appellee.

Acknowledgment of Service.

We, the undersigned attorney of record for the appellee in the above-entitled action, hereby acknowledge due service this —— day of February, 1922, copies of the following papers in said action relating to the appeal to the Supreme Court of the United States:

Petition for Appeal.
Order Allowing Appeal.
Stipulation re Supersedeas Order.
Supersedeas Order.
Assignments of Error.
Bond on Appeal.

HENRY W. PENNOCK,
Solicitor for Appellee.

900 Leary Bldg.,
Seattle, Washington.

[Endorsed]: Acknowledgment of Service. Filed February 27, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3718.

KING COUNTY, WASHINGTON,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,

Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record Upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-four (64) pages, numbered from and including 1 to and including 64, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States, including the opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 13th day of March, A. D. 1922.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3718.

KING COUNTY, WASHINGTON,

Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,

Appellee.

Citation on Appeal.

United States of America,—ss.

To Seattle School District No. 1, a Municipal Corporation, GREETING:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 28th day of April, 1922, pursuant to an order allowing an appeal filed and entered in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, from a final decision made and entered on the 9th day of January, 1922, in that certain appeal, being Cause No. 3718, wherein you are the appellee and King County is appellant, to show cause, if any there be, why the decision of the said United States Circuit Court of Appeals for the Ninth Circuit, affirming the decree rendered against the said appellant as in said order allowing appeal mentioned,

should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. HUNT, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 27th day of February, 1922, and of the Independence of the United States the one hundred and forty-sixth.

W. H. HUNT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Citation on Appeal to Supreme Court U. S. Filed March 6, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3718.

KING COUNTY, WASHINGTON,
Appellant,

vs.

SEATTLE SCHOOL DISTRICT No. 1, a Municipal Corporation,
Appellee.

Acknowledgment of Service.

The undersigned, attorney of record for the appellee in the above-entitled action, hereby acknowledges due service this 3d day of March, 1922, of the

citation on appeal to the Supreme Court of the United States.

HENRY W. PENNOCK,
Solicitor for Appellee.

900 Leary Building,
Seattle, Washington.

[Endorsed]: Acknowledgment of Service of Citation on Appeal to Supreme Court U. S. Filed March 6, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 841.

Supreme Court of the United States

OCTOBER TERM, 1921.

KING COUNTY, WASHINGTON,

Appellant,

VS.

SEATTLE SCHOOL DISTRICT NO. 1, a Municipal Corporation,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANT

MALCOLM DOUGLAS,
Solicitor for Appellant.

HOWARD A. HANSON,
Of Counsel.

P. O. Address:
431 County-City Building, Seattle, Washington.

THE ARGUS PRESS, SEATTLE

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Supreme Court of the United States

OCTOBER TERM, 1921.

KING COUNTY, WASHINGTON,
Appellant,
vs.
SEATTLE SCHOOL DISTRICT NO. 1, a Municipal Corporation,
Appellee.
No. 841.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

This case was brought in the District Court of the United States for the Western District of Washington, Northern Division, and tried before the Honorable Jeremiah Neterer, Judge, who entered a decree in favor of appellee. On appeal to the United States Circuit Court of Appeals for the Ninth Circuit the decree was affirmed. From that affirmance this appeal is prosecuted.

The case involves official exercise of discretion in the disbursement of certain federal forest reserve moneys appropriated by Congress.

In 1905 Congress transferred the Forestry

Service from the Department of the Interior to the Department of Agriculture. Act of February 1, 1905, 33 U. S. Stat. at L., Part I, p. 628.

In 1907 Congress, in a proviso attached to the appropriation bill for the Department of Agriculture, declared as follows:

> "* * * And provided, further, than ten per centum of all money received from each forest reserve during any fiscal year, including the year ending June 30, 1906, shall be paid at the end thereof by the Secretary of the Treasury to the State or Territory in which said reserve is situated, to be expended as the State or Territorial Legislature may prescribe, for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated. Provided, further, that when any forest reserve is in more than one state or territory or county, the distributive share to each from the proceeds of said reserve shall be proportional to its area therein, and provided, further, that there shall not be paid to any state or territory for any county, an amount equal to more than forty per centum of the total income of such county from all other sources * * *."
>
> Act March 4, 1907, 34 U. S. Stat. 1270, Fed. Stat. Annot. Sup. 1909, p. 665.

In a similar appropriation bill for 1908 the

ten per cent was raised to *twenty-five* per cent. Act. May 23, 1908; Fed. Stat. Annot. Sup. 1909, p. 666.

In 1907, the Washington State Legislature passed an act as follows (Laws 1907, Chap. 185, p. 406, Remington's 1922 Code, §§ 6721, 6722):

> "Section 1. That the State Treasurer is hereby directed to turn over to the treasurers of the respective counties within the forest reserves, the amount of money belonging to such county, received from the Federal Government from such forest reserves, in accordance with an act of Congress, approved February 1, 1905. Where the reserve is situated in more than one county the money shall be distributed in proportion to the area of the respective counties interested, and to that end the State Treasurer is hereby authorized and required to obtain the necessary information to enable him to make the distribution on such basis.
>
> "Section 2. County Commissioners of the respective counties to which the money is distributed are hereby authorized and directed to expend said money for the benefit of the public schools and public roads thereof, and not otherwise."

Commencing in 1908 forest reserve funds have annually been paid by the Secretary of the Treasury to the State of Washington. The State Treas-

urer has disbursed these sums to the counties interested. The county commissioners of appellant King County have expended the moneys so received by it at times half to public road purposes and half to public school purposes; at other times all to public road purposes.

Appellee brought suit alleging that King County had not made equal disbursement of such funds annually for public road and public school purposes.

It alleged that if such funds had been equally divided annually, and if the portion thus allotted to public school purposes had been distributed to the several school districts on a pro rata basis, appellee would have received $6,789.22 more than it actually had received.

It alleged that such unequal distribution of such funds constituted a misappropriation by appellant and prayed for judgment for such sum. To the complaint there was interposed a motion and supplemental motion to dismiss the bill of complaint (Tr. pp. 12-15). These were overruled. Later an amended bill of complaint correcting certain figures was filed. By stipulation of the parties the original motion and supplemental motion to dismiss were considered as applying to the amended complaint and were overruled by the court (Tr. p. 18). Appellant refused to plead further. Judgment was entered and the appeal to the Circuit Court of Appeals and to

this court followed. For convenience, reference hereafter to the complaint will be understood to mean the amended complaint.

Appellant contends that under the law the Court has no power to control discretion in the expenditure of these funds, that the county commissioners may determine upon what roads and in what amounts for each road, such funds shall be expended. Also that they may determine whether moneys which they may devote to school purposes shall be expended by the county through its County Superintendent of Schools, or be applied in aid of particular rural schools adjacent to the forest reserve, or be applied to the benefit of all school districts in the county, and if so upon what basis the distribution shall be made.

Appellee contended below that these funds are trust funds, that a court of equity has power to enforce the trust created by the appropriation Act of Congress.

ASSIGNMENTS OF ERROR.

Appellant specifies and assigns error as follows:

I.

That the United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the decree made and entered on the 11th day of July, 1921, by the District Court of the United States

for the Western District of Washington, Northern Division.

II.

That the United States Circuit Court of Appeals for the Ninth Circuit, erred in not reversing the decree of the United States District Court of Washington, Northern Division, aforesaid, on account of error of the United States District Court for the Western District of Washington, Northern Division, in denying the motion interposed by defendant and appellant King County to dismiss the amended bill of complaint in the cause.

III.

That the United States Circuit Court of Appeals for the Ninth Circuit erred in not reversing the decree of the United States District Court of Washington, Northern Division, aforesaid, on account of error of the United States District Court for the Western District of Washington, Northern Division, in denying the supplemental motion interposed by defendant and appellant King County to dismiss the amended bill of complaint filed in the cause.

ARGUMENT.

The decision of the trial court was rendered on the authority of *Everett School Dist. No. 24 v. Pearson*, 261 Fed. 631, which arose out of similar facts and was decided upon the principles of law applicable to *private trusts*. The Court expressly states in the opinion (p. 632):

> "The defendants have moved to dismiss, first, on the ground that the court has not jurisdiction of the subject-matter; second, that the bill of complaint does not state facts to constitute a valid cause of action in equity.
>
> "No argument was presented upon the first ground of the motion to dismiss.
>
> * * * * *
>
> "I think it must be conceded that the acts of Congress (Act March 4, 1907, and Act May 23, 1908, *supra*) created an express trust, of which the several school districts and road districts are the *cestuis que* trustents.
>
> * * * * *
>
> "It would seem that the general rule applicable to the construction of gifts, wills and deeds should apply, where it is established that when bequests, gifts or grants are made to two or more persons, each is presumed to take an equal share, in the absence of limitations to the contrary."

It is thus clear that the trial court both in the

Everett School District case and in the case at bar based its decision upon the general rules applicable to *private trusts.*

The Circuit Court of Appeals in its opinion 278 Fed. 46 (Tr. of R. 45), held that no trust, private or charitable was created, but that "it is a trust, public in its nature, but to be dealt with on like legal principles as pertain to private trusts." Continuing, the opinion states (Tr. of R. p. 51):

> "Nor do we think this a matter between two sovereignties, that is, between the general government and the State of Washington, as is illustrated by the cases of *Alabama v. Schmidt*, 232 U. S. 168; *Emigrant Co. v. County of Wright*, 97 U. S. 339, and *Emigrant Co. v. County of Adams*, 100 U. S. 61."

And again (Tr. of R. p. 52):

> "* * *we concur with the Court below that the language should receive a like construction to that which obtains with the respect to wills, gifts and deeds, where property is bestowed upon or passed to two or more persons without defining the proportion in which they shall take; the presumption being that they shall take in equal portions."

We agree with the Circuit Court of Appeals that the decree cannot be sustained on the theory of either private or charitable trusts, but we

urge that no trust status is created at all; that it is a matter wholly between two sovereignties, the general government and the state, and not a matter for judicial review.

I.

THE TRIAL COURT HAD NO JURISDICTION OF THE SUBJECT-MATTER OF THE ACTION OR OF THE PARTIES.

The Federal Court will not assume jurisdiction where the record shows the parties are all residents of the State, unless the record also shows that the construction of a federal act or treaty is necessary to the decision of the case. The fact that such an act or treaty is incidentally involved does not deprive the State courts of jurisdiction.

Whenever, on the whole record, a construction of the United States Constitution, statute or treaty is directly not incidentally involved, suit may be removed.

> See note to *Little York Gold Washington etc. Co. v. Keyes*, 24 L. Ed. 657, with list of cases there cited.

Federal jurisdiction obtains in

> "cases between individuals and corporations where the * * * laws * * * of the United States shall form the immediate and determining cause of the controversy."
>
> Fed. Cases 8541, *The Louisiana.*

A federal question is one arising under the constitution or a law of the United States or

treaties made, whenever the correct decision of the suit depends upon the construction of either, or when the title or right set up by the party may be defeated by one construction or sustained by the opposite construction.

Cohens v. Virginia, 5 L. Ed. 285;
Osborn v. Bank of United States, 6 L. Ed. 224;
Oregon v. Three Sisters Irr. Co., 158 Fed. 346;
Hall v. Chicago etc. R. R. Co., 149 Fed. 564.

A federal question does not arise merely because it becomes necessary in the progress of the litigation to construe the federal constitution, laws or treaties.

Miller v. Illinois Central R. Co., 168 Fed. 982;
Leggett v. Great Northern R. Co., 180 Fed. 314.

The Act of Congress here creates neither a private trust nor a public charity. The construction of the Federal Act is not necessary to the decision of the case.

The Act creates no right in appellee.

Grants of money and other property by the Federal Government to a particular state are not uncommon. Is there an instance in the books of any attempt by the Federal Government after such grant—no matter what its terms—to con-

trol its disposition in detail? Has the Federal Government, in any instance, followed up the fruits of its beneficence into the hands of the third and fourth generation? Its policy always has been to deal with the *states*, and to leave these sovereignties to deal with their own agencies.

Counsel for appellee suggested in the Circuit Court that *Southern Oregon Co. v. U. S.*, 241 Fed. 16, was a case in answer to our question. Not so, for two reasons, (1) the government there was a party litigant, and of course the court had jurisdiction, (2) the subject-matter of the litigation was *title to land* which under the *express* provisions of the Acts of Congress were subject to *forfeiture* by reason of *enforcible covenants* which had been breached. No such situation exists in the case at bar.

Suppose the State law had not been enacted. Appellee would then have no standing in court. Nor would the county itself, even under the Act of May 23, 1908, which carries this condition:

> "*Provided*, that when any forest reserve is in more than one state or territory or county, *the distributive share to each* from the proceeds of said reserve shall be proportional to its area therein."

The only way the county can get the money out of the State Treasury is by a legislative appropriation.

Yet, it is essential to federal jurisdiction that appellee's right be founded *in the Acts of Congress.*

Even assuming, for the purpose of argument, that the Federal Act contemplates an equal division of the funds for public school and public road purposes, still there is no federal question involved. This is true for the reason that Congress has declared that the funds shall

> "be expended as the State or Territorial Legislature may prescribe."

If the State selected the school districts as the statutory agencies, that would be the rule, and appellee's right to the fund would exist *in virtue of the State law.* Even so, it would not be a *right* in the sense that a *cestui que trust* has a *proprietary right* to trust funds and which are *stripped* of all trust character when coming finally into the hands of the *cestui que trust.* Rather it would be a *duty imposed by State statute* to receive such funds and to disburse them for public uses.

So far as appellee is concerned, its *duty* with relation to such of these moneys as it may receive is *identical* with its *duty* as to state funds paid to it by the State for school purposes.

Moreover, it is to be borne in mind that the question of jurisdiction was not raised in the *Everett School District* case. The Court there said (p. 632):

"The defendants have moved to dismiss, first, on the ground that the court has not jurisdiction of the subject-matter; second, that the bill of complaint does not state facts to constitute a valid cause of action in equity.

"No argument was presented upon the first ground of the motion to dismiss."

We respectfully submit that no federal question is involved and that the Court has no jurisdiction of the subject-matter or of the parties.

II.

THE BILL OF COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE ANY GROUND FOR RELIEF.

A.

THE FEDERAL ACTS ARE ORDINARY APPROPRIATIONS OF PUBLIC FUNDS FOR SPECIFIED PUBLIC PURPOSES.

When the constituted public authority appropriates money for public purposes it discharges a *public power*, not a *private gift*. Can it be said that a state law appropriating money to aid in the construction, improvement and maintenance of public highways in the several counties is a public charity? Is it any more so when Congress with its power over post roads appropriates public funds therefor? In both cases they are appropriations of public funds for public purposes. Congress itself has done much

in aid of public education by grants of public lands and funds for such purposes. Not as a public charity—but in the exercise of its sovereign power.

The *trust*, so called, impressed upon these funds is the same trust which attaches to all legislative appropriations—namely, the authorized disbursements of public moneys for lawful purposes. Neither the law of private trusts, nor that of public charities is applicable.

If the State is *trustee* for the Government on moneys thus appropriated for the benefit of public roads in King County, then King County is a *trustee* for the State on moneys appropriated by it for the benefit of public roads in the County. Both are *appropriations* for lawful public purposes. Neither creates a trust fund. The same principle applies to the public schools.

There are situations where Congress has imposed conditions on the states which the courts have spoken of as *public trusts*. And in that class of cases the courts hold that it is a matter between the two sovereignties.

B.

IT IS A MATTER BETWEEN TWO SOVEREIGNTIES.

In cases of federal grants to the states where a trust character has been recognized, the courts *uniformly hold* that it is a matter between the two sovereignties and no action lies at the in-

stance of counties, school districts or individual citizens.

Judge Dillon, in *Barrett v. Brooks*, 21 Iowa 144, said (p. 148):

> "The United States in this grant deals with the States, and not with counties or individuals. *If the United States is satisfied with the disposition which the State has made, or authorized to be made, of these lands, individual citizens must remain content.*" (Italics ours.)

In *Stearns v. Minnesota ex rel. Marr*, 45 L. Ed. 162, it is said:

> "While some of the lands, the swamp lands were granted to the State for a purpose other than railroad construction, they were granted in trust and *it has long since been settled that Congress alone can inquire into the manner in which the State executed that trust and disposed of the lands.*" (Italics ours.)

In the recent case of *Alabama v. Schmidt*, 58 L. Ed. 555, the Court had under consideration an Act of Congress which provided that Section 16 in every township "shall be granted to the inhabitants of such township for the use of schools." The question presented by that case was whether or not a person could obtain title to these lands by adverse possession. The court,

in passing upon the question, stated as follows (p. 174):

> "But it does not apply to a gift to a state for a public purpose of which that state is the *sole guardian and minister*. As long ago as 1856 it was decided 'the trust created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the state is plenary and exclusive;' and it was held that the State of Michigan could sell its school lands without the consent of Congress. *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338. This decision adverted to the fact that it had been usual for Congress to authorize the sale of lands if the state should desire it, but suggested that it was unnecessary (which, indeed, followed from what was decided) and thus met the further argument here pressed that a qualified permission to sell was given to Alabama by a much later act of March 2, 1827, Chap. 59, 4 Stat. at L. 237. It also disposes of other forms of the same contention, that the state law impairs the obligation of its contract, or involves a breach of trust, supposing that such positions are open to the state to take. *American Emigrant Co. v. Adams County*, 100 U. S. 61, 25 L. Ed. 563; *Spokane & B. C. R. Co. v. Washington & G. N. R. Co.*, 219

U. S. 166, 55 L. Ed. 159, 31 Sup. Ct. Rep. 182. The gift to the state is absolute, although, no doubt, as said in *Copper v. Roberts*, 'there is a sacred obligation imposed on its public faith.' But that obligation is honorary, like the one discussed in *Conley v. Ballinger*, 216 U. S. 84, 54 L. Ed. 393, 30 Sup. Ct. Rep. 224, and even in honor would not be broken by a sale and substitution of a fund, as in that case; a course, we believe, that has not been uncommon among the states. See further *Stuart v. Easton*, 170 U. S. 383, 394, 42 L. Ed. 1078, 1082, 18 Sup. Ct. Rep. 650." (Italics ours.)

The *Alabama* case is controlling on the point that a federal grant "*for the use of schools*" vests absolute title in the state.

American Emigrant Co. v. County of Adams (Iowa), 100 U. S. 61 (25 L Ed. 563), was a case involving swamp and overflowed lands granted to the State of Iowa by the Government upon certain conditions. By State law these lands were granted to the several counties. Adams County entered into a contract to sell these lands to the company, but later sued to rescind the contract, urging that the statutory scheme for the disposal of these lands violated the conditions of the federal grant. The Court said (p. 566):

> "It is very questionable whether the security for the application of the proceeds thus pointed out does not rest upon the good faith of the State, and whether the State may not exercise its discretion in that behalf without being liable to be called to account, and without affecting the titles to the lands disposed of. *At all events, it would seem that Congress alone has the power to enforce the conditions of the grant,* either by a revocation thereof or other suitable action, in a clear case of violation of the conditions. * * * No case is shown as the basis of any complaint, even on the part of the General Government, much less on the part of the County of Adams, which voluntarily entered into the arrangement complained of." (Italics ours.)

American Emigrant Co. v. Wright County, 97 U. S. 339 (24 L. Ed. 912), was relied on below by counsel for appellee as sustaining its position. A consideration of the case will disclose the error of such contention. This, like the *Adams County* case, was an Iowa case involving swamp lands granted to the State and by the State granted to the several counties. Wright County contracted for the sale of these lands and later sued to cancel the contract. This the Court permitted, holding that the officers of the company had not

acted in good faith with the County, saying (p. 916):

> "We are not convinced that any false representations were made by the agents or officers of the Emigrant Company. But the impression made upon us by the whole testimony is, that the officers and citizens of the County were in gross ignorance of the nature and value of what they were selling, that the Emigrant Company, on the other hand, were well informed in regard to both, and withheld this information unfairly from the officers of the County; that the sudden change of the relationship of Mr. Savary from an unsuccessful agent of the County to a successful agent of the Company requires an explanation which has not been satisfactorily given; that the fact that all parties knew they were dealing with a trust fund devoted by the donor to a specific purpose demanded the utmost good faith on the part of the purchaser; that so far from this, there is a provision for a diversion of the fund to other purposes, a gross inadequacy of consideration, and a successful speculation at the expense of the rights of the public."

The American Emigrant Company was a Connecticut corporation. Diversity of citizenship was thus established, the requisite amount was

involved and the court had jurisdiction of the parties. It was determined as an ordinary case of contract rescinded on account of bad faith of one party thereto.

But in the *Adams County* case, *supra*, the court concluded that bad faith was *not* shown, saying (p. 565):

> "* * * we see no sufficient proof that the contract was procured by false and fraudulent representations; and we are unable to sustain the decree of the circuit court on this ground. The case, in this respect, as to the character of the proofs, is very far short of that of the *Emigrant Co. v. Wright Co.* (*supra*)."

Therefore, the *Adams County* case could not be maintained as an equitable action to rescind a contract. Adams County was thus relegated to its other contention that the State statutory scheme for the disposal of the swamp lands was violative of the federal grant.

As is shown by the quotations, *supra*, from that case, the Court was of the opinion that Congress alone had power to enforce the conditions of the grant, that no case was shown as the basis for any complaint even on the part of the general government, much less on the part of Adams County, which voluntarily entered into the agreement complained of.

Counsel for appellee in the court below cited

So. Oregon Co. v. United States, 241 Fed. 16, in support of its position. That was a direct action by the Government itself to *forfeit title* to certain lands granted by the Government in 1869 upon certain conditions. Clearly, the Government itself could insist upon compliance with such conditions and could seek a forfeiture of title for violations thereof. The rule that it is a matter between two sovereignties, is not affected by any act of the Government in suing either the State or its grantee which took title subject to the conditions imposed by the Government. The rule, however, does preclude third parties from maintaining an action. Moreover, the case at bar does not involve real property.

The precise question in the case at bar was considered by the District Court of Alaska in 1915, in *Sulzer v. Smith*, 5 Alaska 338. Suit was brought by certain private citizens to enjoin the disbursement of forest reserve funds by the territorial legislature on the ground that the territorial statute was in violation of the Federal Act. The Court held that the plaintiff had no capacity to sue. After citing the Act of May 23, 1908, Judge Jennings said (p. 342):

> "The trust expressed in the act of Congress is a trust personal to the United States, and this suit is not brought by the United States.
>
> "When Congress directed this money to be

> turned over to the territorial treasurer to be expended in such way as the Legislature of Alaska might prescribe for the benefits of roads and schools in the county where the forest reserve was situate, it created only a personal trust. The money derived from the sale of the forest lands belonged to the United States, and the United States had the power to give it to whomsoever it pleased, and to make any person or body, corporate or unincorporate, its agents to disburse the fund. The United States constituted the Legislature of the territory as its disbursing agent, investing it with a large amount of discretion; the territorial treasurer is but the safe in which the money is deposited. Congress said to the Legislature:
>
> " 'We grant this money to the territory for the benefit of roads and schools in that part of the territory which produced the money, and we trust you to so apply it.'
>
> "If the Legislature does not so apply it, no one can complain but the donor, i. e., the United States."

Trusts may be classified as private trusts, public charities and public trusts. In private trusts there is a known trustee and a definite *cestui que trust* in whom the title to private property is vested and who may sue to enforce his private right.

In public charities there is a known trustee and indefinite, vague, uncertain and changing beneficiaries in whom the title does not vest and who have no private rights which they may enforce in court.

In strictly public trusts there is no charity, no trustee and no *cestui que trust.* There is a public obligation, a grant upon condition enforcible only at the instance of the grantor.

This point was clearly determined in the case of *State ex rel. J. Z. Moore, et al., as the Board of Regents of the State University, plaintiff, v. S. A. Callvert as Commissioner of Public Lands, defendant,* 34 Wash. 58 (74 Pac. 1018).

The Court there had under consideration § 17 of the enabling act which provided that there should be granted to the State of Washington,

> "* * * *for state, charitable, educational, penal and reformatory institutions, 200,000 acres.*" (Italics ours.)

The Legislature of the State of Washington provided that 100,000 acres of this land should be set aside to the University of Washington, and in construing this enabling act, the Court stated (p. 61):

> "It seems to us that the language used in § 17 is not susceptible of construction, and the fact that the legislature may have the power to appropriate to one institution more than its proportionate part of the grant can-

not affect the construction. *This is a question of public policy which must be determined exclusively by the Legislature.* And it cannot be discovered that what might on first thought be considered an unjust apportionment of the grant has any practical effect in any event. All these institutions are maintained by the state and the grant is simply an asset in the hands of the state to aid it in maintaining them. The passage of the act being within the authority of the legislature, the writ will issue as prayed for." (Italics ours.)

Here was a federal grant of six *classes* of institutions and *one-half* of the grant was by the State diverted to one institution in one class—yet the court said:

> "All these institutions are maintained by the state and the grant is simply an asset in the hands of the state to aid it in maintaining them."

What else is the Congressional grant in the case at bar?

The case of *United States v. Louisiana*, 32 L. Ed. 66, is controlling here. Three points were involved—

(1) Congress in 1811 enacted

> "That five per centum of the next proceeds of the sales of the lands of the United States, after the first day of January, shall

be applied to laying out and constructing public roads and levees in the said State, as the Legislature thereof may direct."

Under this provision certain moneys were due the State;

(2) Under the Swamp Land Acts of 1850 and 1855, certain moneys were due the State;

(3) The Government held as an investment for Indian Trust funds certain Louisiana State bonds.

The Government credited on maturing coupons of these bonds its debts under (1) and (2) to the State. The State sued in the court of claims and won, but lost on the Government's appeal.

The State contended that the Act of 1811 and the Swamp Land Acts created express trusts and cited the *Wright County* and *Adams County* cases. The opinion reviews these cases and others following them. In holding that the Government had the right to the set-off for such coupons, the Court said (p. 70):

"In accordance with the views of this court in the cases above cited, it must be held that the proceeds of the swamp lands are not subject to a property trust, either in the hands of the United States or in those of the State, in such sense that the claim of the United States upon the State for the overdue coupons on the Indian Trust bonds, involved in the present case, cannot be set

off against the claim of the State to the swamp land fund.

"Under the Act of 1850 the swamp lands are to be conveyed to the State as an absolue gift, with a direction that their proceeds shall be applied exclusively, as far as necessary, to the purpose of reclaiming the lands. The judgment of the State as to the necessity is paramount, and any application of the proceeds by the State to any other object is to be taken as the declaration of its judgment that the application of the proceeds to the reclamation of the lands is not necessary. By the 2d section of the Act of 1855 it is provided that the purchase money received by the United States for the swamp lands sold by them shall be paid over to the State. *There is nothing in these provisions of the character of a property trust*, and nothing to prevent the application, by the State, of the swamp land fund to general purposes. *If the power exists anywhere to enforce any provisions attached to the grant, it resides in Congress, and not in the court.*

"The same views apply to the provision as to the five per cent fund, in the Act of 1811, that it shall be applied to laying out and constructing public roads and levees in the State, '*as the Legislature thereof may*

direct;' and as to both the five per cent fund and the swamp land fund, we are of opinion that neither of them is of such a character that the debt due to the United States by the State of Louisiana, for the overdue coupons on the Indian Trust bonds, cannot be set off against the fund which is in the hands of the United States." (Italics ours.)

Since the views relating to the Swamp Land Acts apply to the five per cent fund of the Act of 1811, granted for laying out and constructing public roads and levees in the State *"as the Legislature thereof may direct,"* it follows that the forest reserve funds in the case at bar granted for public schools and public roads *"as the Legisture may prescribe"* are so subject. No property trust exists. As the Court said in its opinion,

> *"If the power exists anywhere to enforce any provisions attached to the grant, it resides in Congress, and not in the court."* (Italics ours.)

We respectfully submit that the bill of complaint does not state facts sufficient to constitute any ground for relief.

III.

No Trust Status Exists.

The trial court held that a private trust rela-

tion existed and that the Act of Congress should be construed as are wills and deeds.

The Circuit Court of Appeals held that it was not a case of a private trust or a public charity, but a public trust with a private character, to be construed as ordinary wills and deeds are construed.

A.

LOCAL LAW AS TO PUBLIC SCHOOLS AND ROADS.

Before discussing the trust relation, we desire to refer to the local law as to public schools and roads.

1. *As to Public Schools.*

The language of the federal act is "for the benefit of the *public* schools and public roads * * * of the *county* * * *."

Washington's public school system embraces the common schools (high and elementary) as well as special schools and state institutions like the State University (P. C. 1922 Code § 4720). All code references herein will be to Pierce's 1922 Code.

The administration of the public schools is thus delegated to three groups of officials: State Superintendent, County Superintendents, and Boards of Directors, P. C. §§ 4722, 4970, 4978. Their respective powers are set forth in §§ 4724, 4973 and 4979. Under the general laws, the state levies taxes for the State Superintendent's

office, the county for the County Superintendent's office and, in addition, both the state and county contribute toward the local district's expenses.

Under P. C. § 5097, the county may levy taxes for county school library purposes. School districts may unite for high school purposes, forming union high schools under P. C. §§ 4904, 4952.

For purposes of supervision and administration each county is constituted a separate county school district (P. C. § 4898).

School districts constitute bodies corporate with usual powers of public corporations (P. C. § 4906).

To which of these, county school district, county superintendent's office, county school library, union high schools, or common school districts does the Act of Congress apply? If the decision in this case depends on the construction of the federal act, and that act is held to be controlling, then it vests in appellee enforcible rights even as against a state statute which might provide for the disbursement of the funds for one of the other school system classifications.

If on the other hand, the federal act creates no enforcible rights in appellee, then we submit that the trial court was without jurisdiction either of subject matter or parties and also that appellee has no legal capacity to sue.

Clearly, the state legislature had power to direct the application of such funds as the county

commissioners in their discretion might determine, or for the County Superintendent's office, for County School libraries or for union high schools or for the specific school districts adjacent to the forest reserve itself. The latter in view of the fact that legislative classification is universal in ... application in this state and approved by the ...urts.

State ex rel. Hunt v. Tausick, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802;

Puget Sound P. & L. Co. v. Seattle, 117 Wash. 351, 363, 201 Pac. 449.

What right has a school district to maintain this action, which cannot with equal force be urged by the County Superintendent, who is an independent public officer?

It is quite beside the point for the Circuit Court of Appeals to state, as it did in its opinion (Tr. p. 46), that school districts may sue and be sued. The same is true of the County Superintendent, but that fact invests neither with any right to maintain an action under the facts at bar.

2. *As to Public Roads.*

There is a perfect analogy in the local law relating to county highways (P. C. § 6051). Under this law, general county taxes are levied for "roads, bridges and wharves," also special levies for such purposes for each separate road

district. To that act there is a proviso that the county treasurer shall remit to the city or town treasurers in the county 15% of the money collected in such city or town for the general road and bridge fund, and

> "* * * said moneys so remitted shall be expended by the corporate authorities of such city or town on roads and bridges within said city or town connecting with roads leading out into the country known or designated as county roads" (P. C. § 6051).

Now, first, there can be no question but that the moneys in the general road and bridge fund, can be expended for roads, *or* bridges, *or* wharves, *or* all as and in such sums as the county commissioners in their discretion may determine, and by the same token, in the case at bar, the state statute (L. 1907, p. 406, P. C. § 6722) authorizing county commissioners to expend the forest reserve funds "for the benefit of the public schools and public roads, and not otherwise," authorizes the board of county commissioners in their discretion to expend these funds for public roads, *or* public schools, *or* both.

In the case of deeds, wills and private gifts, the trustee has no discretion. The grantor grants for the use of the *cestui que trust.* If the grant is to two or more in undetermined amounts the rule is that they are to share equally.

But in the instant case, the government paid

the money to the *state treasurer* "to be expended as the state legislature may prescribe." In the exercise of *its* discretion, the legislature left it to the discretion of the county commissioners. How then can it be held that a rule of law, applicable to private transactions where no discretion exists, can have any bearing on the case? As a matter of fact ,the state legislature could have made any disposition of these funds which it might have seen fit to do, and no one could complain except Congress.

This is so for the further reason that in the case of legislative appropriations for public purposes, there is no *cestui que trust* at all, the appropriation is for the benefit of the public. Nor does any element of contract exist here, as in the case of an issue of municipal bonds, wherein it may be stipulated that taxes shall be levied for principal and interest the taxes to be placed in a special fund pledged solely to that purpose.

So long as the action taken by the state is satisfactory to Congress, the federal court is without jurisdiction. If the action taken by the local authorities is contrary to the local law, it is a matter for local courts to determine, if equity jurisdiction can attach at all.

B.

APPROPRIATIONS.

The federal act under consideration is a *proviso* in the *appropriation* acts for the De-

partment of Agriculture for 1907 and 1908. Under that law all income from the Forest Reserves is covered into the federal treasury.

All federal disbursements must be by congressional appropriations (U. S. Const., Art. 1, Sec. 9).

> "The limitation in the Federal Constitution is that 'no money shall be drawn from the treasury but in consequence of appropriations made by law.' The object of this limitation, and that contained in the constitutions of the several states of similar import, is to secure to the legislative department the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government. 2 Ops. Atty. Gen. U. S. 670. It had its origin in the British parliament, when the people of Great Britain, to provide against abuse by the king and his officers of the discretionary power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by parliament. Hallam, Const. Hist. 55. This was the fruit of the English revolution of 1688, which sent the king to Versailles, and changed the succession to the throne. This wise restraint has become a part of the fundamental law

of nearly every state in the Union. It has been well said that these provisions were 'obviously inserted to prevent the expenditure of the people's treasure without their consent, either as expressed by themselves in the organic law, or by their representatives in constitutional acts of legislation. To use the language of *Justice* Story (Vol. 3, Com. § 1342), its purpose 'is to secure regularity, punctuality, and fidelity in the disbursements of the public money.' "

State ex rel. Henderson v. Burdick, 24 L. R. A. 266, 267.

"The origin of legislative appropriations is so well known that it seems almost a work of supererogation to here allude to it. Legislative appropriations are the outgrowth of the long struggle in England against royal prerogative. By degrees the power of the crown to levy taxes was restrained and abolished, but it was found that, so long as the crown might at its own discretion disburse the revenue, the reservation to the people through parliament of the power to raise revenues was not a complete safeguard. Efforts to control the crown in disbursement as well as in the collection of revenues culminated with the revolution in 1688, and since then the crown may only disburse moneys in pursuance of appropriations made

by act of parliament. Three evils were at that time felt. In the first place, the use of the realm's revenue for purposes unlawful or distasteful to the people; secondly, the inability to control the crown in the amounts expended for particular objects; and thirdly, the disposition of the crown to avoid encroachments upon its self-asserted prerogatives by dispensing for long periods with sessions of parliament. By requiring appropriation for limited periods it was sought to remedy all three evils—the first two by making appropriations specific in amount and object, and the third by making them for limited periods, so that frequent parliamentary sessions should be absolutely necessary. The first two objects have been the subjects of repeated comment. The third, in view of our constitutional provision for biennial legislative sessions, and limiting the duration of appropriations to the end of the quarter succeeding the following session, justifies us in quoting the following from 2 Hallam's Constitutional History, Chapter 15, page 330: 'The lords of the treasury, by a clause annually repeated in the appropriation act of every session, are forbidden, under severe penalties, to order by their warrant any moneys in the exchequer, so appropriated, from being issued

> for any other service, and the officers of the exchequer to obey any such warrant. This has given the house of commons so effectual a control over the executive power, or, more truly speaking, has rendered it so much a participator in that power, that no administration can possibly subsist without its concurrence; nor can the session of parliament be intermitted for an entire year, without leaving both the naval and military force of the kingdom unprovided for': See, also, Creasy on the Constitution, 293."
>
> *State v. Moore*, 61 A. S. R. 538, 542;

See also

> *State ex rel. Davis v. Eggers*, 16 L. R. A. (N. S.) 630, 633;
>
> *State ex rel. Noonan v. King*, 67 S. W. 812, 814.

So much for the *reason* for the federal constitutional provision relating to appropriations. It never has been the province of the courts to interfere with the discretion of the crown, or the discretion accorded to executive officers by acts of Parliament or of Congress. Official discretion in the disbursement of public funds is the same today as before Parliament gained its ascendency, except that disbursements cannot be made for unauthorized purposes, nor in excess of appropriations.

From an examination of the 1907 appropria-

tion Act, it will be seen that it authorizes the expenditure of public funds for public purposes specified in the act, and, except in particular instances, leaves to the disbursing authority full discretion, except that disbursements cannot be made for unauthorized purposes.

Take the special case of free seeds, etc. There Congress is specific stating:

> "* * * An equal proportion of five-sixths of all seeds, bulbs, shrubs, vines, cuttings, and plants shall, upon their request, after due notification by the Secrertary of Agriculture that the allotment to their respective districts is ready for distribution, be supplied to Senators, Representatives and Delegates in Congress for distribution among their constituents * * *."
>
> 34 U. S. Stat. at L., p. 1268.

On the other hand the act allows the director of public roads $57,660.00 (p. 1280) for eleven itemized purposes. If the construction applied by the Circuit Court of Appeals is sound, then he *must* expend funds for each of these authorized purposes and in *equal proportions*—an untenable position.

Neither is there any merit in the claim that the *proviso* in question is different from the rest of the Act in that it is a *grant* to a state or political subdivision thereof. So is the appropriation by the act (p. 1278) of more than $1,000,000

for agricultural experiment stations of the several states. The construction contended for by appellee would compel the *pro rata* expenditure of such funds for the several specific purposes—a construction manifestly foreign to the purpose of the Act.

C.

THE LAW OF PRIVATE TRUSTS IS INAPPLICABLE.

The essential elements concurring in the creation of a private trust are

(1) A person competent to create it;
(2) Sufficient words to create it;
(3) A person capable of holding as trustee a specified or ascertainable object;
(4) A definite subject, and
(5) A declaration of the terms of the trust.

26 R. C. L. 1179.

Referring to the beneficiary, that same recognized authority states (26 R. C. L. 1189):

> "It is established by an unbroken line of decisions that there must be found within the terms of a declaration of trust a *cestui que trust*, and if there are no *certain* and *competent* beneficiaries named who may come into a court of equity and claim and establish their right to the fund and to the execution of the trust it will be void for uncertainty. It is not necessary to name the beneficiary, but he must be so designated

or described that he can be identified." (Italics ours.)

As to the trustee it is stated (26 R. C. L. 1271):

> "A trustee is a person holding the legal title to property, under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called the *cestui que trust*. A trustee is one of the essential elements of every express trust,"

and as to the remedies of the *cestui que trust*, the rule is declared in 2 Perry on Trusts, 6th Ed. § 843, p. 1380:

> "If the *cestui que trust* is unable to trace the trust fund into the hands of other persons, or into the hands of third persons, other than *bona fide* holders for value or into other property in the hands of the trustee, or if he elects not to do so, he may proceed against the trustee personally. If the trust property or its proceeds cannot be identified, the *cestui que trust* may proceed against the trustee as against an ordinary creditor, and it is said, that if he elects to proceed against the trustee personally, he cannot also proceed against the trust fund."

An examination of the briefs of counsel in the *Everett School District* case and the cases cited therefrom by the court discloses the fact that that

case was determined in consonance with the foregoing principles of law relating to private trusts.

We shall, therefore, briefly refer to the authorities so cited.

Smith v. Ayer, 101 U. S. 320 (25 L. Ed. 955), was a will case where the executor had used assets of the estate for his personal gain. The Court very properly said (p. 958):

> "The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. Whoever takes it for an object other than the general purposes of the trust, or such as may reasonably be supposed to be within its scope, must look to the authority of the trustee, or he will act at his peril."

Grant v. Phoenix Mut. Life Ins. Co., 121 U. S. 105 (30 L. Ed. 905), was a suit by the *cestui que trust* to foreclose the equity of redemption in property covered by twenty-six trust deeds. It was held that the suit was not multifarious and that the *cestui que trust* could maintain the action.

President and Trustees of Bowdoin College v. Merritt, (C. C.) 54 Fed. 55, was a will case wherein the parties in interest later entered into a trust agreement. The *cestui que trustent* under such trust deed brought suit to enforce the provisions of the trust. Their right to maintain such suit was upheld by the court.

In its opinion in the *Everett School District* case the court said (pp. 632-633):

> "The reception of the money by the defendant treasurer, under the provisions of the congressional and state acts, carried with it notice of the object and purpose of the money and its trust character, and any disposition of the funds contrary to the trust was at the defendant's peril (Smith v. Ayer, 101 U. S. 320, 25 L. Ed. 955), and the cestui que trust is not remediless when the fund is dissipated, but may sue in equity to protect such right (39 Cyc. 448; Grant v. Phoenix Life Insurance Co., 121 U. S. 105, 7 Sup. Ct. 841, 30 L. Ed. 905; President & Trustees of Bowdoin College v. Merritt (C. C.) 54 Fed. 55). * * *
>
> "I think it must be conceded that the acts of Congress (Act March 4, 1907, and Act May 23, 1908, supra), created an express trust of which the several school districts and road districts are the cestuis que trustents."

The cases cited in the footnote (p. 634) in the *Everett School District opinion* all involve deeds or wills. Hence, it is clear that the *Everett School District* case was disposed of on the law of private trusts. We most earnestly urge that such law is wholly inapplicable here because the

essential elements necessary to the creation of a private trust are lacking.

D.

THE LAW OF PUBLIC CHARITIES IS INAPPLICABLE.

In discussing the subject of public charities, the author in 2 Perry on Trusts, 6th Ed. § 687, p. 1130, says:

> "Trusts for charitable uses form a large and important class of trusts. The questions that arise under this head are numerous, and often complicated and difficult of solution. Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick, and the afflicted; and all gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire to have them applied. These trusts are governed in many respects by the same rules that govern trusts for the private benefit of individuals or families. *There must be the same proof of the due execution of a written instrument*, whether it creates a public charity or a private trust, and in many respects the same rules of construction will apply, in order to determine the intention of the donor; but if it is once determined that the donor intended to create

a public charity, very different rules from those that are applied in establishing and administering private trusts will be applied, in order to give effect to the intention of the donor and establish the charity. Thus, if in a gift for private benefit the cestuis que trustent are so uncertain that they cannot be identified, or cannot come into court and claim the benefit conferred upon them, the gift will fail, and result to the donor, his heirs or legal representatives. But if a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain, or incapable of taking, or that the objects of the charity are uncertain and indefinite. Indeed, it is said that vagueness is in some respects, essential to a good gift for a public charity, and that *a public charity begins where uncertainty in the recipient begins.* * * *" (Italics ours.)

And again (p. 1135):

"All this legislation for charity finally culminated in the Stat. 43 Eliz. c. 4 (1601), commonly called the statute of charitable uses. The charitable objects and purposes enumerated in this statute are as follows: 'Relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; *schools of learning, free schools,* and scholars in universities; repairs

of bridges, ports, havens, causeways, churches, sea-banks, and *high-ways;* education and preferment of orphans; relief, stock, or maintenance for houses of corrcetion; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.' * * *" (Italics ours.)

Public Charity is defined in 5 R. C. L. 293, as follows:

"A gift is a 'public' charity when there is a benefit to be conferred on the public at large, or some portion thereof, or upon an indefinite class of persons. Even if its benefits are confined to specified classes, as decrepit seamen, laborers, farmers, etc., of a particular town, it is well settled that it is a public charity. The essential elements of a public charity are that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite, unrestricted quality that gives it its public character. * * *"

DISTINCTION BETWEEN CHARITABLE AND PRIVATE TRUSTS.

"The requisites of a valid private trust, and of one for a charitable use, are material-

ly different. In the former there must not only be a certain trustee who holds the legal title, but a certain specified *cestui que trust*, clearly identified, or made capable of identification, by the terms of the instrument creating the trust; while it is an essential feature of the latter that the beneficiaries are uncertain, a class of persons described in some general language, often fluctuating, changing in their individual members, and partaking of a quasi-public character. * * *"

5 R. C. L. 295.

A gift for the aid or benefit of defined persons is a private trust and not a charity.

Ballard v. Chandler, 149 Mass. 532-540.

"If the gift is for a public, charitable purpose, it is immaterial that the *cestuis que trustent* are indefinite or uncertain, or that the trustee is uncertain or incapable of taking."

Pennoyer v. Wadhams, 20 Or. 274, 25 Pac. 720;

John v. Smith, 91 Fed. 827.

This case went to the Circuit Court of Appeals, 102 Fed. 218, where it was *affirmed*.

In its affirming opinion the Oregon court "has recognized a clear distinction between charitable trusts and other trusts." The *beneficiaries* may be uncertain and unknown.

It is the *use* to which the property is applied and not the persons benefited which the law regards in such a case (See bottom p. 221.)

EDUCATIONAL PURPOSES.

"A trust for the purposes of education is a good charitable trust. The particular character of the education sought to be fostered by a charitable trust does not in any way affect its validity. * * *

"Trusts for the establishment and support of free or public schools are favored by the courts, and bequests for such purposes have repeatedly been upheld as valid charities or as creating valid trusts for charitable uses."

5 R. C. L. 330-331;

See also 2 Perry on Trusts, § 700.

STATE MAY ACT AS TRUSTEE.

"So, a state government has capacity to take a bequest to it for the purpose of establishing a school therein; and the legislature of the state may provide by law for the institution of the school and the administration of the charity."

14 L. R. A. (N. S.) 113;

See also *Levy v. Levy*, 40 Barbour 625.

POWER TO SELECT PURPOSE GIVEN TO TRUSTEE.

"Although the power of the courts to devise a scheme for the application of a vague

charity may well be questioned, it does not follow that the testator cannot create an agency to do it for him; and it may be regarded as settled in most jurisdictions that where a testator, creating a trust to a charitable use, defines the intention of the trust, and invests the trustee with discretionary power over the application of his bounty for the purposes intended, the bequest will not be held invalid so long as there is no obstacle to the exercise of the power confided to the trustee, for the exercise of the power may relieve the bequest of all objections arising out of its vague and indefinite character."

5 R. C. L. 351.

JURISDICTION OF COURTS.

"With regard to the origin and extent of the equitable jurisdiction over charitable trusts in this country, there is the utmost conflict of judicial utterances in the earlier cases. The opinion seems formerly to have prevailed that the peculiar equitable jurisdiction over charities, except where a trust valid by the ordinary rules of law and equity was created, was derived solely from the statute of uses. In more recent times, however, the subject of charities has undergone a great deal of investigation, both in England and the United States; and it has become definitely settled that trusts for charit-

able uses, or public charities, as known at the present time, are of ancient origin and have long been recognized as a part of the common law."

5 R. C. L. 357.

"The distinctive principles of equity, which courts apply to the enforcement and regulation of trusts for charitable uses, are confined to those States which have adopted the Statute 43 Eliz. c. 4, or the principles of the common law in regard to trusts, as they existed prior to the statute."

2 Perry on Trusts, 1239-40.

This rule is recognized by the Washington Court *In re Stewart's Estate*, 26 Wash. 32, where the court said (p. 38):

"That charitable uses have always been recognized by courts of equity seems to be established by undoubted authority. It is not necessary for authority to be sought under the Statute of 43 Elizabeth, for courts of equity here to recognize and enforce such trusts. Their inherent, original jurisdiction of all trusts gives cognizance of trusts for charitable uses."

It is further observed (p. 35):

"If the devise be for charitable uses, it is immaterial that the objects of the charity are uncertain and indefinite. Indeed, it is

said that vagueness is, in some respects, essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins. 2 Perry, Trusts (4th ed.), § 687; 2 Pomeroy, Equity Jurisprudence (2d ed.), §§ 1018-1020. *It seems that a claimant for charity cannot have right to demand. A beneficiary who founds his claim on right cannot be the subject of charity.* Therefore the beneficiaries, as individuals, must be uncertain in a public or charitable trust." (Italics ours.)

In *Peth v. Spear*, 63 Wash. 291, Justice Fullerton said (p. 295):

> "Since the purpose of its donors was to provide a place where the doctrines of socialism could be taught by example as well as by precept, the trust can be said to belong to that species of charitable trusts known as educational. As such it is among the objects enumerated as charitable by the statute of 43 Eliz., c. 4, and within practically all the definitions of a charitable use as announced by the authorities."

We respectfully submit that the principles of law which govern charitable trusts are wholly foreign to those which obtain with respect to legislative appropriations. The essential elements in the one are absent from the other.

There is a diversity of underlying reason in

the two cases. In the one there is a *private* donor who for his own reasons by an instrument in writing duly executed, has set aside property or funds for specified public or quasi-public purposes. But the functions of government are exercised and continue quite apart from private benefactions. The legislative authority appropriates and the executive expends the public treasure. Neither Congress nor the judiciary can *compel* the executive to expend funds where discretion is involved. We recognize, of course, that the courts can compel ministerial officers to draw and pay warrants for adjudicated claims. The only limitation upon official discretion is that public disbursements cannot be made for other than public purposes, nor for purposes not authorized by the legislative branch, nor in excess of appropriations.

For a federal court of equity to take jurisdiction over an appropriation matter, to decree to whom, and how and in what specific amounts public funds shall be disbursed is an encroachment upon the powers of the executive.

It is not the function of the court to control the exercise of discretion.

7 R. C. L. 1047, 1048;
McQuillan, Munic. Corp. § 376,
22 R. C. L. p. 490;
Gaines v. Thompson, 19 L. Ed. 62.

E.

APPELLEE HAS NO LEGAL CAPACITY TO SUE.

It seems clear from the foregoing that appellee cannot maintain this action. As a private trust, appellee is not named as a *cestui que trust.* As a private trust, when trust property is turned over to the *cestui que trust,* such cestui assumes ownership and control thereover *stripped of any trust character,* but appellee is not so entitled to these funds.

As a public charity, the beneficiaries are indefinite, and in this case—if it be a public charity —the beneficiaries are those who enjoy the advantage of common schools and public roads—not appellee and, by the way, it is the same general public which in such case under appellee's position would enjoy both. In what amounts and how the funds are disbursed within the county can make no difference to the public since both roads and schools are supported by public taxation.

As a public trust, so called, the United States alone have power to enforce the conditions of the grant.

Sulzer v. Smith, 5 Alaska, 338, 342;
Alabama v. Schmidt, 58 L. Ed. 555;
Am. Emigrant Co. v. County of Adams, 25 L. Ed. 563;
Am. Emigrant Co. v. Wright County, 24 L. Ed. 912;
U. S. v. Louisiana, 32 L. Ed. 66.

CONCLUSION

This case involves an issue reaching down to the fundamentals of our system of government—the right of a court of equity to control discretion in the expenditure of public funds appropriated by law for public purposes.

If the use of the conjunctive in the proviso fixed the amount to be allotted to schools and to roads, then all legislation in the various states—framed on a different basis—is void as repugnant to the federal statute.

If appellee's right is founded in the state law—the action should have been brought in the state court. If the right rests in the federal statute, then state legislation cannot vary that right and the discretion accorded to it is meaningless.

We respectfully submit that the decision is unsupported by authority and unsound in principle. Congress did not concern itself with the *relative* needs for schools and roads, nor with the specific instrumentalities by which these funds were to be expended. For sufficient reasons it appropriated public funds for certain public purposes and left the rest to the state legislatures—not the court—to prescribe.

We urgently insist that the lower court erred in selecting the rules of law applicable to the facts at bar. Here is a case of public money appropriated by public authority to be used for public purposes. Wherein can the law of private

trusts apply? Wherein can the law of public charities apply, since a public charity is a *private benefaction* for public uses?

Public appropriations for public roads and public schools are not public charities. They are an exercise of sovereign power.

If one sovereignty turns public money over to another sovereignty for public purposes, that creates neither private trust nor public charity. If a trust relation results—it is a strictly public trust, personal to the originating sovereign.

So in the case at bar. Neither the law of private trusts, nor of public charities applies in this case. The *Everett School District* case is basically unsound and should be overruled. So long as Congress and the State remain content no one can question appellant's method of disbursing these funds. They are to be expended "by the county commissioners" as moneys are expended when raised for "road and bridge purposes."

"How much goes to roads and how much to bridges is for the commissioners to determine, in the light of the local needs of the County as a whole. *Where* and *when* the road money and the bridge money is to be spent is for them to say.

So in the case at bar, where the road money is to be spent is for them to determine. Certainly as a matter of *legislative policy* Congress did not contemplate that they would spend the road

money in Seattle. Neither has it placed any restrictions on *where* the school money shall be expended. Certain isolated school districts and road districts directly affected by the existence of the forest reserves might need all these moneys.

Congress left the whole matter of discretion to the State legislature. That body imposed the discretionary duty upon the counties—arms of the State government. If the court is to substitute judicial discretion as to the *proportion* to be allotted to roads and to schools then by the same logic it has power to determine *what* roads and *what* schools shall participate and how much each shall receive. It can say also that the school money shall be given to the County Superintendent, who is an integral part of the public school system and who is financed by county tax levies. But such is not the function or the power of the court.

We are not concerned in the suggestion that this decree helps the public schools. We believe in the public schools and as prosecuting attorney are *ex-officio* legal representative (P. C. § 1786) of all school districts in King County, except appellee district. We likewise believe in good roads and our loyal support extends to both.

But such sentiments are of no controlling force here. The primary issue is the right, under our system of government, of a court of equity to

control the discretion of public officials in the expenditure of public funds appropriated by law.

We respectfully submit that the decision of the Circuit Court of Appeals was erroneous, and should be reversed with instructions to reverse the decree of the trial court and dismiss the action.

Respectfully submitted,

MALCOLM DOUGLAS,

Solicitor for Appellant.

HOWARD A. HANSON,

Of Counsel.

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In the

Supreme Court of the United States

OCTOBER TERM, 1921

No. 315 30

KING COUNTY, WASHINGTON,
Appellant

vs.

SEATTLE SCHOOL DISTRICT NO. 1,
a Municipal Corporation, *Appellee*

BRIEF OF APPELLEE

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In the

Supreme Court of the United States

OCTOBER TERM, 1921

No. 841

KING COUNTY, WASHINGTON, *Appellant*

vs.

SEATTLE SCHOOL DISTRICT NO. 1, a Municipal Corporation, *Appellee*

BRIEF OF APPELLEE

SUPPLEMENTAL STATEMENT OF THE CASE

The controversy in this case is based solely on what occurred in King County, Washington for seven successive years which is clearly shown in the following table:

Year	Total Received from State	Apportioned to Road and Bridge Fund	Apportioned to School Fund
1909	$ 542.34	$ 542.34	Nothing
1910	1,334.34	1,334.34	Nothing
1911	2,762.14	2,762.14	Nothing
1912	4,799.13	4,799.13	Nothing
1913	3,256.95	3,256.95	Nothing
1914	2,544.88	2,544.88	Nothing
1915	1,617.03	1,617.03	Nothing
	$16,856.81	$16,856.81	Nothing

By the decree from which this appeal has been taken the balance has been restored to the above account by awarding to Seattle School District its proper proportion of the fund for those years, on the theory that Congress intended an equal division of the fund between schools and roads.

It is worthy of note that appellant's main argument in the Court of Appeals as well as in the District Court has been entirely omitted from appellant's brief. It was to the effect that the acts of Congress created a public trust or charity and that the Attorney General *only* was authorized to sue in the courts for a breach of the trust. To make this point counsel cited numerous authorities

showing the distinction between public and private trusts. The Court of Appeals while holding that these acts of Congress did not fall strictly within the definition of either a public or private trust, yet, even considered in the light of a public trust, it was unnecessary in a case like the present, for the Attorney General to institute the suit. From a long line of authorities the court selected two cases in support of its position. In view of the fact that this question has been eliminated from the trial in this court we shall omit extensive argument presented in the Court of Appeals.

As we understand the contention of counsel, now made in this court, the Acts of Congress are to be regarded neither in the light of a public or private trust but only as an ordinary appropriation of funds by Congress.

ARGUMENT

Reduced to its last analysis the question in this case is this: Is there sufficient vitality in the Acts of Congress of March 4, 1907 and May 23, 1908, to prevent County Commissioners in the State of Washington from excluding public schools from

participation in the benefits flowing from these acts? While the District Court and the Circuit Court of Appeals have answered the question in the affirmative and the end attained appears to be reasonable and just, the question is still open to the test of equitable principles.

I

THE INTENTION OF CONGRESS

At the foundation of this case lies the intent of Congress. To keep in mind the language used in the two acts under consideration we here repeat the act of March 4, 1907, which gives directions for the expenditure of the fund:

> "* * * And provided, further, that ten per centum of all money received from each forest reserve during any fiscal year, including the year ending June 30, 1906, shall be paid at the end thereof by the Secretary of the Treasury to the State or Territory in which said reserve is situated, to be expended as the State or Territorial Legislature may prescribe, for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated. Provided, further, that when any forest reserve is in more than one state or territory or county, the distributive share to

each from the proceeds of said reserve shall be proportional to its area therein, and provided, further, that there shall not be paid to any state or territory for any county, an amount equal to more than forty per centum of the total income of such county from all other sources. * * *" (34 Stat. L. 1270.)

Disregarding for the moment the explicit directions contained in the latter part of this act, what was the attitude of Congress with respect to the public schools and roads? Did Congress intend to leave it to the states to decide whether one or the other of these public objects should receive all of the benefits from the fund? It is worth while to consider the course of legislation by Congress, for more than a century, to catch the spirit of the many provisions made by the government for public education in the states. Beginning with the Ordinance of 1785 we find that the practice of setting apart section 16 of every township of public lands for the maintenance of public schools was provided for in this early enactment. The appropriation of public lands for that object became a fundamental principle by the Ordinance of 1787 which settled the terms of compact between the people and states of the Northwestern Territory, and the original states, which was to be unalterable except by consent. The

latter ordinance ordained that "schools and the means of education should be forever encouraged."

As successive states were admitted into the Union there was a provision in the several compacts that section 16 of each township should be granted to the states for the purpose of maintaining the public schools. Later the grant was enlarged to include section 36 in each township. Still later Congress increased its gifts to the several states by providing that 5 per cent of the proceeds of the public lands should be paid to the states for the support of the common schools. The culmination of this general course of legislation is illustrated in the act of April 19, 1864, admitting Nebraska as a state into the Union. (Stat. L. 13, p. 49, sec. 12.) Then follows the act of 1907, now under consideration, which provides for an additional fund for both schools and roads. To further indicate the importance which the government attached to the public schools, Congress in the various enabling acts creating the several states, required the people of those states to assume certain solemn obligations. They are illustrated in the enabling act providing for the admission of the states of Washington, and other states, approved February 22, 1889 (25 Stat. L. 676). In section 4 we read:

"And said conventions shall provide by ordinances irrevocable without the consent of the United States and the people of said states.
* * *

"*Fourth*, that provision shall be made for the establishment and maintenance of systems of public schools which shall be open to all the children of said states and free from sectarian control."

We may note here the manner in which the State of Washington met this obligation by quoting from the Constitution:

"It is the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste or sex.

"The Legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools and such high schools, normal schools and technical schools as may hereafter be established." (Const. of Washington, Art. IX, Sections 1 and 2.)

Following the command of the Constitution the Legislature enacted a School Code providing for a complete and uniform system of public schools, to which reference will be made later.

But Congress did not stop with gifts for the common schools but has, from time to time, made grants of lands and funds for universities, agricultural colleges, normal schools, scientific schools and other public educational institutions. Various acts of Congress granting lands or setting aside funds for educational purposes in the several states are illustrated in the following which are taken from a large number of acts of that character:

3 Stat. L. 545, Sec. 6 (Sub. sec. 3).
5 Stat. L. 788, Sec. 1.
5 Stat. L. 790, Sec. 5 (Sub. sec. 5).
4 Stat. L. 494 (Missouri).
9 Stat. L. 178 (Wis.).
11 Stat. L. 167, Sec. 5 (Sub. sec. 5).
11 State L. 383, Sec. 4 (Sub. sec. 5).
25 Stat. L. 676, 680 (Wash. N. D. etc.).

II

PUBLIC ROADS

While Congress was bestowing gifts upon the states in aid of education it did not entirely forget public roads, canals and other improvements of that character. One of the earliest acts making such provision is found in the act of March 6, 1820, admitting the state of Michigan to the Union provid-

ing for a gift to the State of 5 per cent of the proceeds of the sale of public lands for the purpose of constructing roads and canals. (3 Stat. L. p. 547.) A similar provision is found in later acts of Congress and it may be said that Congress has shown a commendable interest in public improvements of that character. But Congressional *solicitude* has never at any time been exhibited for the furtherance of such improvements, as it has been shown in a marked degree for the extension of education among all the people. We may then fairly say that if Congress had any intention at all to direct the application of the Forest Reserve fund it intended to further education in the counties where the forest reserves were situated, as well as to benefit roads located therein.

Appellant contends, as we understand it, that while those charged with the administration of the fund would not be permitted to use it for any purpose other than the two purposes named, they would be permitted to use the fund for *either*, at the expense of the other. If Congress had meant that the fund might be used for either purpose it would have said so as it did in an Act applying to eight states where there was a provision that the United States shall,

"Pay to the states of Missouri, Michigan, Florida, Iowa, Wisconsin, Minnesota, Oregon and Nevada, 5 per cent of the net proceeds of the sales of all public lands lying within their limits for the purpose of education, *or* of making public roads and improvements. * * *" (U. S. Revised Statutes 1878, p. 728.) (Italics ours.)

III

ACTS OF CONGRESS CREATE A TRUST

Counsel have at some length argued that neither a public nor private trust was created by the Acts of Congress. We do not think that question is important. If the Acts provide for a fiduciary relation between those receiving and those entitled to receive the fund, a trust of some kind was created. Text writers have divided trusts into numerous classes and sub-classes. (Perry on Trusts, 6th Ed., secs. 18 to 27.) This classification is merely for convenience and not for the purpose of excluding everything in the nature of a trust which does not appear to fall exactly in any class. So we may not be disturbed by the cases defining public and private trusts and the attempt to distinguish the differences between them. That Congress understood there was a trust implied, if not directly

stated, in its several grants to the states in aid of schools, is indicated in the act of March 2, 1867, creating a Department of Education. In section 4 of that act after providing for a Commissioner of Education the act provides:

> "In the first report made by the Commissioner of Education under this act there shall be presented a statement of the several grants of land made by Congress to promote education and the manner in which these several trusts have been managed, the amount of funds arising therefrom and the annual proceeds of the same as far as the same can be determined." (14 Stat. L. 434.)

From a large number of special acts of Congress recognizing this trust relationship we select the following for illustration:

9 Stat. L., page 281, in which the state of Alabama was permitted to sell land granted for *internal improvements* and to apply the proceeds to *schools.*

9 Stat. L., page 42, in which the State of Arkansas was permitted to sell 72 sections of land granted for a *seminary of learning* and to apply the proceeds to the *common schools.*

12 Stat. L., page 536. The conditions contained in a prior act granting to the state of Iowa five sec-

tions of land for completing and erecting public buildings were released, and the state was permitted to dispose of the land *as it might deem for the best interests of the state.*

4 Stat. L., page 305, in which the State of Illinois was permitted to sell lands which had been granted for the use and support of "*Ohio Saline*" and to devote the proceeds "of such sale to such objects as the State Legislature may by law hereafter direct."

22 Stat. L., page 484, amends a prior act granting lands to the states for agricultural colleges and changes the terms on which the proceeds of the sale may be invested and used.

Chapter 2934, Act of March 4, 1907, in which the State of Oklahoma was permitted to convey to the Board of Education of the city of Chandler, section 16, a school section.

41 Stat. L., page 233, permits the regents of the State University of Washington, for the purpose of securing land suitable for a demonstration forest and to be used for a forest experiment station, to exchange lands granted for *University purposes and for state penal and reformatory institutions*, for *school land* of equal value.

The courts have likewise declared grants of this character to be trusts. In the case of *American Emigrant Co. v. Wright County*, 97 U. S. 339, this court had under consideration a grant of the United States of swamp lands, for the purpose of draining and improving such lands. The court pronounced the grant a trust and in summing up the case at the end of the opinion says:

> "But the impression made upon us by the whole testimony is that the officers and citizens of the County were in gross ignorance of the nature and value of what they were selling; that the Emigrant Company on the other hand were well informed in regard to both and withheld this information unfairly from the officers of the county. * * * That the fact that all parties knew they were dealing with a *trust fund devoted by the donor to a specific purpose* demanded the utmost good faith on the part of the purchaser,—so far from this there is a provision for a diversion of the funds to other purposes, a gross inadequacy of consideration and a successful speculation at the expense of the rights of the public." (Italics ours.)

In the State of Missouri it was held that the Federal grant of land for the use of the public schools was in the nature of a trust.

Butler v. Chariton County Court, 13 Mo. 112.

IV

A FEDERAL QUESTION IS INVOLVED

Appellant questions the jurisdiction of the Federal Court on the ground that this controversy involves only a state law. It will be observed the Act of the Washington Legislature of 1907, in its main provisions, merely repeats the language of the Act of Congress of the same year. What does that language mean? Did it mean the same to the State Legislature as it did to Congress? What would a State Court say it meant? Would the State courts in the different states agree on the interpretation of this language? What latitude is allowed the states, if any, in diverting the fund? The answer to these questions must, in the last analysis, depend upon the intent of Congress in using the language which created the trust. To determine this question it is important to consider the history of other congressional legislation of the same general nature.

Smith v. Townsend, 148 U. S. 490 (37 L. ed. 533).

Mobile & O. R. Co. v. Tennessee, 153 U. S. 486 (38 L. ed. 793).

Appellant has insisted that the language of the Act implies authority on the part of officers dis-

bursing the fund to ignore the public schools entirely. If that interpretation should be adopted by the court the ruling would extinguish the School District's rights in this case and would determine the appeal. We are, therefore, within the Federal jurisdiction under the rule of those cases which have gone the farthest in denying jurisdiction. Among the cases cited by counsel under this head is *Oregon v. Three Sisters Irr. Co.*, 158 Fed. 346. The State of Oregon had entered into a contract with the defendant to construct irrigation works under the Carey Act. Plaintiff alleged that the contract complied in all respects with the act of Congress and that the defendant had violated the contract. Upon removal to the Federal Court it was claimed a Federal question was not involved. The court says (p. 350):

> "True, the especial grievance complained of is the alleged breach of the contract, and *it might be that the ultimate issue would simply resolve itself into one of fact* as to whether the defendant has complied with the stipulations of the agreement. But such stipulations are essentially obligations to comply with the provisions of the Carey Act, and the suit is nevertheless one touching the right or privilege of the complainant accorded under the act, and the act itself is certainly involved by the litiga-

tion. *It is hardly possible that the state can maintain its rights and privileges thus granted without in some way* calling to its aid some, if not many, of the provisions of the act, and drawing into controversy the proper interpretation and rendering of such provisions." (Italics ours.)

The case of *St. Paul M. & M. Ry. Co. v. St. Paul & N. P. Ry. Co.*, 68 Fed. 2, (C. C. A.) involved transactions which primarily rested upon the validity of state laws only. The federal grant to the state was the groundwork upon which the state had carried out a plan of railroad construction. The bill of complaint only indirectly called for the construction of a federal act. The court says (p. 11):

> "It is obvious that it (the plaintiff) derives its right to sue solely from the act passed by the legislature of the State of Minnesota on March 1, 1877, the material provisions of which act have been embodied in the foregoing statement."

And again on pages 13 and 14:

> "If it appears, in any aspect which the case may assume, that the right of recovery may depend upon a construction of those (federal) acts, and if the right to recover so far as it turns on the construction of federal statutes is not merely a colorable claim, but rests upon

a reasonable foundation then a federal question is involved which is adequate to confer jurisdiction. * * * If a case is commenced originally in the circuit court, and, by a fair construction of the complaint, it appears that the plaintiff predicates his right to relief on the meaning or effect of a law of the United States, and the claim is made in good faith, so that there is a real instead of a merely colorable controversy, then jurisdiction over the case exists, even though it may appear that the right to the same relief is asserted on another ground, that does not involve the consideration of a federal question. In concluding the discussion on this branch of the case, it is proper to add that we do not concur in the view that the case is one of federal cognizance merely because the title to the lands in controversy is derived from the United States. The bill shows very conclusively that both parties claim under the State of Minnesota, that the title to the state is not challenged, but is conceded to be well founded under the granting acts. *The questions at issue all grow out of the manner in which the state dealt with the lands* after it acquired the same from the general government." (Italics ours.)

One of the first questions which the trial court was called upon to decide in this case was whether the act of Congress had the effect of permitting the States to use the fund in any way and for any pur-

poses they chose. The terms of the Act itself strongly suggest that Congress had a very definite purpose which it was determined to accomplish. Otherwise, why did Congress provide that the fund should be used for the benefit of schools and roads only *in the counties where the Forest Reserves were situated?* And why did it still further provide that the schools and roads of such a county should receive only the proportion of the fund which represented sales of timber *from that county?* We think the Congressional intention is clear. The creation of a Federal Forest Reserve has the effect of depriving the county in which it is located of a part of its taxable resources, and when the timber is removed that portion of the county's native resources is forever lost. To compensate, in a measure, Congress returns a substantial portion of the proceeds of the sale of the timber, to the very county which has sustained the loss, and in exact proportion to that loss. The latter very explicit requirement of the Act is a plain indication that Congress was not dealing broadly with the several states containing Forest Reserves, but had in mind a very definite plan for dealing with particular communities. Then there is another question of intent. Did Congress intend that the schools and

roads should share the gift equally? The Trial Court and the Circuit Court of Appeals after examining numerous Acts of Congress and taking into consideration the general rule applied by the courts to gifts, wills and deeds, came to the conclusion that Congress intended an equal division. This rule is not questioned by counsel and is supported by abundant authority which may be illustrated in:

In re McConnell, 197 Fed. 438, 441.
Markoe v. Wakeman, 107, Ill. 251, 261.
Gerting v. Wells, 103 Md. 624.
In re Conner's Will, 39 N. Y. Supp. 900.
Guerin v. Guerin, 110 N. E. 402 (Ill.)
Harris v. Keasbey, 53 Atl. 555 (N. J. Ch.)

V

IT IS NOT SIMPLY A MATTER BETWEEN TWO SOVEREIGNTIES

It is asserted that the disposition of the Forest Reserve Fund is a matter which concerns only the United States and the State of Washington—two sovereignties. Seven cases are cited in support of this contention as follows:

Barrett v. Brooks, 21 Iowa 144.

Stearns v .Minnesota, ex rel Marr, 45 L. Ed. 162.

Alabama v. Schmidt, 58 L. ed. 555.

American Emigrant Co. v. County of Adams, 25 L. ed. 563.

Sulzer v. Smith, 5 Alaska 338.

American Emigrant Co. v. Wright County, 24 L. ed. 912.

United States v. Louisiana, 127 U. S. 182, 32 L. ed. 66.

Inasmuch as the decisions from Iowa and Alaska were based on the decisions of this court they need not be separately considered. Counsel might also have added the following:

Cooper v. Roberts, 18 How. 173 (15 L. ed. 338.)

Mills County v. Burlington & M. R. Co., 107 U. S. 557, 27 L. ed. 578.

Hagar v. Reclamation District, 111 U. S. 701, 28 L. ed. 569.

This, we believe, completes the list of cases decided by this court which may be fairly said to have any bearing on the point raised.

Cooper v. Roberts, supra was first in point of time. It was an action in ejectment involving the title to a school section which had been sold and conveyed to the plaintiff by the State of Michigan. The defendant claimed the state had no authority

to sell the land under the original grant of school land to the state, contending that special permission to sell should have been secured from Congress. The court recognizes the fact that certain states had applied to Congress for permission to sell school lands and that Congress had been in the habit of granting such requests, but the court holds that it was unnecessary to secure Congressional consent and proceeds (page 341):

> "The trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the State is plenary and exclusive. In the present instance, the grant is to the State directly, *without limitation of its power*, though there is a sacred obligation imposed on its public faith. We think it was competent to Michigan to sell the school reservations without the consent of Congress." (Italics ours.)

Alabama v. Schmidt, supra, (58 L. ed. 555) was a case of the same type. In that case the state sought to recover possession of a school section which had been in the adverse possession of the defendant more than twenty years, which, according to the Statute of Limitations of the state, made his title good. On behalf of the state it was claimed that the land had been impressed by the government with a trust which prevented the state from dis-

posing of it. The court cites *Cooper v. Roberts, supra*, to the effect that the state might have *sold* the land under the grant and cites *Northern Pacific R. R. Co. v. Ely*, 197 U. S. 1, 8, to the effect that title under a statute of limitations is equivalent to a conveyance by deed.

These cases go no further than to hold that states may sell school lands and convey a perfect *title* unburdened by the trust created by the acts of Congress.

In *American Emigrant Co. v. Wright County, supra* (24 L. ed. 912), this court for the first time had under consideration the "Swamp Land" grant of the United States to the several states. This grant was contained in the Act of September 28, 1850, (9 Stat. L. 519) and by it all swamp and overflowed lands were granted "to enable the state to construct the necessary levees and drains to reclaim them." Following the grant, which was absolute in terms, was this proviso:

> "*Provided*, that the proceeds of said lands whether from sale or by direct appropriation in kind shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid."

There was a further provision in the act which is described by the court as follows (page 914):

> "The statute made it the duty of the Secretary of the Interior to make out accurate lists and plats of the lands described as aforesaid, and transmit the same to the Governors of the States; and at the request of the Governors to cause patents to be issued, which patents should *vest the fee simple to said lands in the States, subject to the disposal of their respective Legislatures.*" (Italics ours.)

The State of Iowa by an act of its legislature had conveyed all swamp lands included in the grant to the several counties in which the lands were situated, with an injunction that the lands, or their proceeds, should be devoted to the reclamation of swamp lands and if, when this was accomplished anything remained, to building of roads, bridges, etc. By a subsequent act counties were permitted to use these lands or their proceeds for public buildings and various public improvements and to accomplish these purposes the counties were authorized to sell the lands. Wright County had sold certain swamp lands to the Emigrant Company and brought this suit to set aside the sale and deed on the grounds that the terms of the original government grant had been violated and that fraud had been practiced

by the Emigrant Company in securing title to the lands. This court sustained both contentions of the county and affirmed a decree setting aside the entire transaction.

American Emigrant Co. v. Adams County,supra, (25 L. ed. 563), involved the same act of Congress and the same acts of the State Legislature. The case differed from the Wright County case in that no fraud had been shown on the part of the Emigrant Company and the decision turned on the proper construction to be given to the Federal grant of swamp lands to the state. After referring to the Wright County case the court says:

> "Our first view was, that this trust was so explicit and controlling as to invalidate the scheme finally devised by the Legislature of Iowa for the disposal of the land, and under which the contract in question was made. But on more mature reflection, after hearing additional argument, we are satisfied that such a result did not necessarily follow."

The court then refers to the acts of the state legislature and continues:

> "The argument against the validity of the scheme is, that it effects a diversion of the proceeds of the lands from the objects and purposes of the congressional grant. These were

declared to be to enable the State to reclaim the lands by means of levees and drains. The proviso of the 2d section of the Act of Congress declared that the proceeds of the lands, whether from sale or direct appropriation in kind, should be applied exclusively, as far as necessary, to these purposes. This language implies that the State was to *have the full power of disposition of the lands;* and only gives direction as to the application of the proceeds, and of this applicatioin only *'as far as necessary'* to secure the object specified. It is very questionable whether the security for the application of the proceeds thus pointed out does not rest upon the good faith of the State, and whether the State may not exercise its discretion in that behalf without being liable to be called to account, and without affecting the titles to the lands disposed of. At all events, it would seem that Congress alone has the power to enforce the conditions of the grant, either *by a revocation thereof* or other suitable action, in a clear case of violation of the conditions. And as the application of the proceeds to the named objects is only prescribed 'as far as necessary,' room is left for the exercise by the State of a large discretion as to the extent of the necessity. In the present case it is not shown by allegations in the bill, or otherwise (if such a showing would be admissible), that any necessity existed for devoting the proceeds of the lands in question to the purposes of drainage." (Italics ours.)

We have quoted freely from this case because it has been invariably cited in the later decisions. It will be noted that the court brings out clearly two features in the Act of Congress which had not been given consideration in the Wright County case. *First*, that the State was to have full power of disposition of the lands. *Second*, that the proceeds need only be applied to reclamation "as far as necessary" to secure the object specified. In other words it was left to the State to determine how far it was necessary to use the lands, or the proceeds, for the purpose. In this connection we quote from the latest "swamp land" case decided by this court:

United States v. Louisiana, supra, (32 L. ed. 66.) Speaking of the phrase "as far as necessary" the court says on page 70:

> "Under the Act of 1850 the swamp lands are to be conveyed to the State as an absolute gift, with a direction that their proceeds shall be applied exclusively, as far as necessary, to the purpose of reclaiming the lands. The judgment of the State as to the necessity is paramount, and any application of the proceeds by the State to any other object is to be taken as the *declaration of its judgment* that the application of the proceeds to the reclamation of the lands is not necessary." (Italics ours.)

This case has been stressed by appellant because of certain other expressions used by the court. The case however is easily distinguishable from the case at bar by the fact that the gift which the government had promised to the State of Louisiana had not yet been delivered. It was still in the possession of the government. The State was indebted to the United States and the court permitted the government to retain the fund which had been promised but not delivered to the State, as a set-off against the amount which the State was owing. Nothing short of a complete and unconditional delivery is sufficient to constitute a valid gift and until delivery the gift is inchoate and revocable.

Basket v. Hassell 107 U. S. 602, 27 L. ed. 500.

Bowen v. Kutzner, 167 Fed. 281, 297 C. C .A.

But even upon the theory of a completed gift the case is unlike the one at bar for the reason that the gift in the Louisiana case was to the State as a whole, whereas in this case the gift is directed to certain chosen localities, and for specific reasons, as we have already shown.

Mills County v. Burlington & M. R. Co., supra, (27 L. ed. 578), was another case from Iowa. Mills County under a permissive act of the State Legis-

lature had agreed to convey swamp lands to the rail road company to aid construction of a railroad in the County. The case was practically identical in principle with *Amercian Emigrant Co. v. Adams County, supra.*

In *Hagar v. Reclamation District, supra,* (28 L. ed. 569), the rule announced in the Mills County case was merely restated.

In *Stearns v. Minnesota ex rel Marr, supra,* (45 L. ed. 162), the question to be decided was the constitutional right of the State to tax railroad property. Incidentally, it was claimed a federal question was involved by reason of a contract between the state and the company for the conveyance of swamp lands. The right of the state to so contract was affirmed on the authority of *American Emigrant Co. v. Adams County, supra.*

We have now cited all the known cases decided by this court which are supposed to justify the acts of the County Commissioners of King County in the case at bar. The net result may be thus stated. *First,* Congressional grants of this kind create trusts but the trust provisions are not fastened upon the granted lands in such a manner as to bind one purchasing from the State. *Second,* if the grant

allows the state to use the fund in one way or another, at its discretion, and this privilege has been abused, Congress alone can interfere.

In some of the swamp land cases we find the expression used that a violation of the trust was a question for Congress, as it plainly was. Until Congress changed the terms of the grant so as to eliminate the phrase "as far as necessary" even the government was powerless to interfere with the States' discretion.

VI

GOOD FAITH OF THE STATE

The terms "Good Faith of the State" and "Honor of the State" are used in some of the cases. These expressions might indicate that States possessed a higher degree of honor or could be trusted to a greater degree than individuals. The cases where States have been sued directly by the United States, or by sister States, show conclusively that there is another reason for the immunity of States from certain classes of litigation. We cite the following:

South Dakota v. N. Carolina, 48 L. ed. 448.
United States v. Texas, 36 L. ed. 285.
United States v. Michigan, 47 L. ed. 1103.
New Jersey v. New York, 8 L. ed. 127.

Kansas v. Colorado, 46 L. ed. 838.

Virginia v. W. Virginia, 51 L. ed. 1068, 1080.

Missouri v. Illinois, 45 L. ed. 497.

Without attempting to analyze these cases we cite them to show,

First, that states are said to be immune from suits like the present not because they are presumed to possess a higher degree of honor than individuals nor,

Second, because there is any lack of power in the Federal courts to enter judgments and decrees aganst them (except as limited by the 11th Amendment) but,

Third, because a money judgment cannot be enforced against a sovereign state. Therefore, any suit calling for such a judgment must depend for its final fruition upon the voluntary action of the State and therefore rests simply upon honor.

Fourth, when the judgment of the court can act upon something tangible such as land (in boundary disputes) the courts have full power not only to render, but also to execute, their judgments.

Southern Oregon Company v. United States, 241 Fed. 16 (C. C. A.) is a case which throws light up-

on our claim that the Government is interested in grants of this character and that their requirements may be enforced. That case involved a grant of land to the State of Oregon to aid in the construction of a military wagon road and required the land to be sold in small tracts at $2.50 per acre. The State had turned the land over to a private corporation which had constructed the road but had violated the requirement that the land be sold in small tracts and at not to exceed $2.50 per acre. It was held that while the primary purpose of the gift was to aid the State in the enterprise of constructing the road there was a secondary purpose clearly shown by the act of Congress to induce actual settlement of the land. Although the road had been completed for more than forty years the court held that the government was in a position to insist upon the performance of the secondary purpose of the grant. At the trial of the case in the District Court (225 Fed. 560) the defendant contended that the disposition of the grant was a matter which rested upon the good faith of the State of Oregon and could not be questioned, citing *Mills County v. Railroad Co., supra,* and other similar cases. The court refused to apply the doctrine of the above cases and it is worthy of note that when the case was tried

in the Court of Appeals the court made no mention of this point and it appears to have been abandoned by counsel representing the Southern Oregon Company. That case bears a further resemblance to the case at bar in that the State had passed on to its grantee the obligation to carry out all requirements of the Congressional grant.

VII

THIS IS NOT A SUIT AGAINST THE STATE

We may admit that had the state diverted the trust fund to a purpose foreign to the grant, even the government would be obliged to rely upon the honor of the state to restore the fund, for the above reasons. But the state did not divert the fund. On the contrary it sent it on its way to accomplish the exact purposes named in the Acts of Congress. The State has already shown its good faith and it only remains to follow the fund into the hands of those who have received it, and with knowledge of the terms of the trust, have diverted it from the use intended. Those dealing with trust funds in that way may be required to account.

Smith v. Ayer, 101 U. S. 320 (25 L. ed. 955).

Union Pacific R. R. Co. v. McAlpine, 129 U. S. 305 (32 L. ed. 673).

Mechanic's Bank v. Seton, 1 Peters 299, 309.

United States v. Carter, 217 U. S. 286.

As we are not dealing with the state the question of immunity cannot arise. The act of the State of Washington which transferred the fund to the several counties required a distribution of the fund in accordance with the directions of Congress. King County received the fund, which is in controversy in this case, and became responsible for its proper application.

Maryland Casualty Co. v. Washington Nat. Bank, 92 Wash. 497, 501 and cases cited.

VIII

APPROPRIATIONS

We had not supposed anyone would question the necessity of a Congressional appropriation to release funds from the Treasury of the United States. We concede that these funds never would have reached the states but for the Permanent Appropriation Acts cited by counsel. But these were not the ordinary current appropriations of Congress to

be expended by government departments and officials. They were gifts, as much so as if 25 per cent of the timber land itself had been conveyed in trust for the same purpose.

Under this head counsel have endeavored to show that if the rule applicable to gifts were applied to certain itemized appropriations of Congress, the officer receiving them would be required to divide the fund equally among the several items. In the first place such appropriations are not gifts—they are mere governmental expenditures. A government appropriation ordinarily goes to a department, or officer, having charge of some particular branch of the service. The items of such appropriation would all relate to that department. It is a matter of common knowledge, however, that public schools are under the management of boards having nothing to do with the roads, and likewise that County Commissioners, whose chief duties are to maintain roads and bridges, have no direction over school affairs. The controversy in this case arose, and has been maintained, because of the widely separated duties of School District officers and County Commissioners. "Public schools" and "public roads" cannot be likened to departmental items in an appropriation bill.

Legislative Power Was Not Delegated to the County Commissioners

Counsel have asserted that under the act of the state legislature the state delegated to county commissioners the power to determine what should be done with the fund. The language of the Act does not require such a construction, but if it did, the attempted delegation of the power would be void.

Coquard v. Chariton Co., 14 Fed. 203.

Lake Shore etc. R. R. Co. v. Hutchins, 37 Ohio State 282.

Singleton v. Scott, 11 Iowa 589.

Gale v. Kalamazoo, 23 Mich. 344.

The legislature had already provided the state with an elaborate School Code and all the things deemed essential and beneficial to the schools were included in that code. The only way the County Commissioners could legally expend the fund for the benefit of the schools was by placing it in the school treasury where it would automatically benefit every school in King County.

The County Commissioners already had full charge and direction of the public road system under laws then existing. The legislature had there-

fore, provided machinery for carrying out the will of Congress, but, unfortunately, County Commissioners in certain counties have insisted upon appropriating the whole amount of the gift entrusted to them.

IX

POWERS OF SCHOOL DIRECTORS IN WASHINGTON

Counsel have made some general, and we think confusing, statements, about the provisions of the School Code of the State of Washington. Counsel cite (without quoting) sections 4720, 4722, 4724, 4898, 4904, 4906, 4952, 4970, 4973, 4978, 4979 and 5097 of Pierce's Code of 1922, and put this question:

> "To which of these, County School District, County Superintendent's Office, County School Library, Union High Schools, or common School Districts does the Act of Congress apply?" (Appellant's brief, p. 29.)

Had counsel quoted the above sections in full they would have furnished an answer, like this: All school property and funds (when they reach the county treasurer) belong to the several school

districts and are under the control of school directors, who alone become responsible for their safekeeping and expenditure.

Washington's school system has assigned different functions to its different officers and boards. Without attempting to set these out in detail we call special attention to the function of school districts and school district directors. In the first school code enacted at the time of the admission of Washington as a state there was the following provision in relation to school districts:

> "Sec. 18. The term 'school district,' as used in this act, is declared to mean the territory under the jurisdiction of a single school board, designated as 'board of directors,' and shall be organized in form and manner as hereinafter provided, and shall be known as district No. ----------, ---------- county: *Provided*, That all school districts now existing as shown by the records of the county superintendents, are hereby recognized as legally organized districts." (Session Laws of Washington, 1889, p. 361.)

Section 4906 Pierce's Washington Code 1922, provides as follows:

> "Sec. 4906. A school district shall constitute a body corporate and shall possess all the usual powers of a corporation for public purposes, and in that name and style may sue and be

sued, purchase, hold and sell such personal and real estate, and enter into such obligations as are authorized by law; and the title to all school buildings or other property, real or personal, owned by any such school district shall, upon the organization of a district under the provisions of this act, vest immediately in the new district, and the board of directors of such school district shall have exclusive control of the same for all purposes herein contemplated."

Section 4984 of the same code provides as follows:

> "Sec. 4984. The board of directors of each school district shall have custody of all school property belonging to the district, and shall have power, in the name of the district, to convey by deed all the interest of their district in or to any school house or lot directed to be sold by vote of the district and all conveyances of real estate made to the district shall vest title in the district; said board, in the name of the district, *shall have power to transact all business necessary for maintaining school and protecting the rights of the district.*" (Italics ours.)

Section 4979 of the same code contains the general powers of school directors. It is of such length we will not attempt to quote it. The Supreme Court of Washington has recently decided that school districts are mere "arms of the state" for administering its school systems. In *Howard v. Tacoma*

School District, 88 Wash. 167, 170, the court says:

> "1. Unlike cities and towns, school districts, though corporate entities and classed as municipal corporations, are essentially only *quasi* municipal corporations. State ex rel. School Dist. No. 24 v. Grimes, 7 Wash. 270, 34 Pac. 836. They are mere *arms of the state* for the administration of its school system. Practically all of their functions are therefore governmental." (Italics ours.)

Under the Washington School Code the State Superintendent and County Superintendents are clothed with certain powers of supervision, principally over the educational work. But they have no statutory right to institute legal proceedings as representatives of the public school system nor of any part of it.

If we have shown that Congress had any intention of directing the purposes for which, and the localities where, this substantial trust fund should be expended, the decree of the District Court is in full accord with the principles of equity applicable to trusts of this character.

Respectfully submitted,

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No. [redacted]30

Supreme Court of the United States

OCTOBER TERM, 1921.

KING COUNTY, WASHINGTON,
Appellant,

vs.

SEATTLE SCHOOL DISTRICT NO. 1,
a Municipal Corporation,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

APPELLANT'S REPLY BRIEF

MALCOLM DOUGLAS,
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ARGUMENT.

Counsel for appellee in their brief (p. 2) have inadvertently, no doubt, misstated our position in the lower courts, thereby implying a change of front on our part. We have always maintained that no private trust or public charity is involved in this case, also that no public trust is established; but that, if it be so held, then it is a strictly public trust, personal to the originating sovereign.

With respect to the reference (p. 2) that we

maintained that the Attorney General alone was authorized to sue, that argument was addressed to cases dealing with public charities. Confusion of terms results where reference is made to Attorney General cases involving public acts. *State ex rel. Atty. Gen'l. v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 68 Pac. 946, 70 Pac. 114, illustrates one phase, the court holding that under the local statute the *Prosecuting Attorney*, not the Attorney General, was the necessary party to institute *quo warranto* proceedings to test the defendant's right to occupy public streets in Seattle under the local gas franchise.

The next class of cases is illustrated by

People v. Ingersoll, 58 N. Y. 14, Book XII N. Y. C. C. Appeals Reports, p. 390;

Atty. Gen'l. v. Garner (1907), 2 K. B. Div. 480,

cited by the Circuit Court of Appeals in its opinion (Tr. p. 48). In *People v. Ingersoll*, the county had sold general obligation bonds and obtained the money, a part of which was disbursed on false and fraudulent vouchers. It was held that title to the money was in the county and hence the Attorney General could not maintain the action. In *Atty. Gen'l. v. Garner*, the right of pasturing stock on certain lands was held to be a private property right vested in the Parish Council, under the English Local Government Act, for the invasion of

which the Attorney General could not maintain an action.

Both of these cases turned upon *ownership* of the money and property rights involved. As was said in *People v. Ingersoll*, 58 N. Y., 14 C. C. of Appeals Reports, Book XII, p. 390:

> "Of course, the action ought to be maintained by the party who is regarded as the technical *owner* of the money, and the party so regarded in the law is the party to maintain the action." (Italics ours.)

Here, neither Federal nor State Act turns the money over to the School District, and, accordingly the cases relied on by the Court below are inapposite. Nevertheless the principle of the Attorney General cases such as

> *Jenkins v. Berry* (Ky.), 83 S. W. 594;
> *Atty. Gen'l. v. Clark*, 45 N. E. 183;
> *Jackson v. Wendell Phillips*, 96 Mass. 539;
> *Stearns v. Newport Hospital* (R. I.), 62 Atl. 132,

does apply to cases of public charities as we contended below and to strictly public matters as in the *Seattle Gas & Electric Co.* case *supra* (except that under the local law the prosecuting attorney is the necessary party). But it does not apply to litigation arising over property or property rights of a local municipal corporation or political subdivision of the state.

We have not advanced views in this court con-

trary to those expressed below. Since the Circuit Court of Appeals so plainly recognized that the case was not one of a private trust or public charity, we thought it unnecessary to press this phase of the argument. However, as counsel have referred to it, we deem it appropriate to make our position plain to the court.

I.

THE INTENTION OF CONGRESS WAS TO TURN THE MONEY OVER TO THE STATES, NOT TO SCHOOL DISTRICTS.

Counsel for appellee (pp. 4-8) refer to the intention of Congress, but the instances cited show that Congress in each case is dealing directly *with the States*, not with school districts. The *compact* references, cited by counsel (pp. 6-7), to the Washington Enabling Act and to the State Constitution relate to the fundamentals of American Government, republican in form with no distinction in civil or political rights on account of race or color and not to be repugnant to the Constitution of the United States and the principles of the Declaration of Independence, and particularly to the 13th and 14th Amendments to the Federal Constitution. But they have no bearing on this case.

The Washington Enabling Act referred to (p.

7) was construed by the State Supreme Court in *State ex rel. Moore v. Callvert*, 34 Wash. 58, 74 Pac. 1018, from which we quoted in our opening brief (p. 23), the court holding that the disposition of lands granted for six classes of educational institutions was

> "* * * *a question of public policy, which must be determined exclusively by the Legislature.*" (Italics ours.)

Also that

> "*All these institutions are maintained by the state and the grant is simply an asset in the hands of the state to aid it in maintaining them.*" (Italics ours.)

So in the case at bar. Public schools and public roads are maintained by taxation and the federal appropriation is an asset to aid in their maintenance and

> "* * * to be *expended* as the State or Territorial legislature may prescribe, for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated."

Congress declared that the legislature should prescribe who should *expend* the money. The legislature designated the County Commissioners. There is no warrant for the claim of appellee that Congress intended that the School District should expend the money.

II.

Appropriation of Public Funds For Public Purpose Is Not a Gift.

Counsel for appellee (p. 8 and elsewhere) refer to congressional appropriations for education, roads, canals and other improvements as *gifts*. They recognize federal power to appropriate public funds for educational purposes. Respecting public roads, the power of Congress rests in the subdivision of Sec. 8 Art. I, U. S. Constitution authorizing it to establish post offices and post roads. As to canals, its authority is vested in the power to regulate commerce, also found in Sec. 8 of Art. I. An exercise of these powers does not constitute a gift, but an appropriation for authorized public purposes. In the case of *lands*, congressional *grants* may be made to pass *title* directly to the States, instead of by the issuance of patents pursuant to law. But in the case of appropriations, it is sufficient to direct the Secretary of the Treasury to pay certain funds to the state treasurer as provided in the act for authorized public purposes.

A gift is a gratuity. The discharge of functions of government is not.

Parkinson v. State, 74 Am. Dec. 522;
Williamson v. Johnson, 22 Am. St. Rep. 117;
Martin v. Martin, 67 N. E. 1;
Ristine v. State, 20 Ind. 328, 339;

Journal Pub. Co. v. Kenney, 24 Pac. 96;
Forsyth v. Reynolds, 14 L. Ed. 729.

III.

No Trust Status Exists.

Counsel suggest (pp. 10-13) that a trust is created, but they do not point out how. They refer to certain statutes relating to lands, in each of which it appears that Congress dealt directly with the states.

They rely, also, upon the term "grant" as creating a trust. Not so. No appropriation of public land can be made for any purpose, but by authority of an Act of Congress. Title may pass by patent under the public land laws, or by a direct Act of Congress.

U. S. v. Fitzgerald, 10 L. Ed. 785;
Wilcox v. Jackson, ex dem. M'Connel, 10 L. Ed. 264;
Ryan v. Carter, 23 L. Ed. 807.

Their sole reliance is on *American Emigrant Co. v. Wright County*, 24 L. Ed. 912, which we discussed in our opening brief (p. 18). But they have cited no authority contrary to the rule that—assuming a grant with conditions to exist—the authority to enforce the conditions of the grant resides in Congress, and not in the court (for argument and authorities see our opening brief, pp. 14-27).

IV.

THE TRIAL COURT HAD NO JURISDICTION OF THE SUBJECT MATTER OF THE ACTION OR OF THE PARTIES.

Appellee urges (pp. 14-19) that its rights are founded in the federal appropriation Act, that although the Act creates no private trust or public charity, it is still to be construed in accordance with principles applicable to gifts, wills and deeds. This assumption cannot avail appellee for the gift is not to it. Appellee is not a devisee under the will; it is a stranger to the deed, and by like token, it is not recognized in the state statute. Mere assertion of protection under a federal act—without more—will not warrant the assumption of federal jurisdiction. There is no diversity of citizenship here and the construction of the appropriation Act is not necessary to the decision of the case.

The whole matter is determinable solely in virtue of the State Act which directed the County Commissioners to *expend* the money, imposing no powers and duties in that behalf upon school districts, which like counties, as counsel point out (p. 39), are mere arms of the state for the administration of governmental functions.

If the state had not passed its appropriation Act, manifestly appellee could not state a cause of action in any circumstances. How, then, can it now claim that the federal act is necessary to

a decision of the case? We submit that the trial court had no jurisdiction of either subject matter or parties.

V.

THE BILL OF COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE ANY GROUND FOR RELIEF.

A.

IT IS A MATTER BETWEEN TWO SOVEREIGNTIES.

In discussing this point, counsel (pp. 19-29) have submitted no argument or authority contrary to the reasoning of the cases cited in our brief (pp. 14-27). Indeed they concede (p. 29) that

> "* * * if the grant allows the state to use the fund in one way or another, at its discretion, and this privilege has been abused, Congress alone can interfere."

Counsel have inadvertently erred in suggesting (pp. 26-27) that *U. S. v. Louisiana*, 32 L. Ed. 66, is distinguishable from the case at bar in that in the *Louisiana* case the money

> "* * * was still in the possession of the government,"

while here it had long since passed to the state, since the court there expressly held (p. 70) that

> "* * * the proceeds of the swamp lands are not subject to a property trust, *either in the*

hands of the United States or in those of the State * * *." (Italics ours.)

It cannot avail appellee to discuss (pp. 29-33) suits against a state, the immunity of a state from certain classes of litigation, or the application of principles of equity to cases of express trusts. These matters are all foreign to the issues in this cae.

Southern Oregon Co. v. U. S. 241 Fed. 16 (C. C. A.) cited by counsel (p. 30) as we pointed out in our brief (p. 21) was a direct action by the Government itself to *forfeit title* to certain lands *granted upon certain conditions.* The Government is not party to the instant suit. Here title to the money has passed from the Government, to be *expended* in the discretion of the state legislature, unimpressed with any property trust, or conditions affecting title.

B.

APPROPRIATIONS.

As we understand counsel's position (pp. 33-34) they concede that if the funds in question had been turned over to a governmental department or official for disbursement, they would be ordinary current appropriations and discretion over their disbursement could not be controlled by the courts.

But, they urge, since Congress turned the funds over to the state to be expended in the dis-

cretion of the legislature for such public purposes, they have lost their character as funds appropriated for authorized public purposes, and have become gifts to be controlled by the courts according to the principles of law relating to gifts, wills, and deeds. We submit that such view is wholly unsound in that it violates the fundamental principles of our government because it accords to the judiciary power to interfere with and control discretion vested in the executive branch of government (see cases cited p. 50 our brief).

Congress might have directed in detail *when, where, how,* and *by whom* the funds should be expended. But it did not. The legislature said *by whom,* but left *when, where* and *how* to the County Commissioners to determine as public necessity and convenience should require.

C.

THE QUESTION OF DELEGATION OF LEGISLATIVE POWER IS NOT IN ISSUE.

Congress left it for the state legislature to prescribe *by whom* the funds should be *expended.* The legislature did so. No delegation of legislative power resulted as urged by counsel (pp. 35-36). Indeed if appellee's position that a trust exists be sound, then the county is powerless to pay any funds to appellee because, under the cases relied on by appellee (p. 35), funds turned over

to the county, to be expended by the County Commissioners *cannot be paid over to appellee to be expended by it.*

This is shown by the opinion in *Coquard v. Chariton County,* 14 Fed. 203, 206, cited by counsel:

> "It may be taken as well-established law that whenever trusts or discretionary powers are to be exercised, the exercise thereof cannot be delegated."

VI.

SCHOOL DISTRICTS CONSTITUTE BUT ONE BRANCH OF THE PUBLIC SCHOOL SYSTEM UNDER THE LOCAL LAW.

Counsel erred in stating (p. 36) that

> "All school property and funds (when they reach the county treasurer) belong to the several school districts and are under the control of school directors, who alone become responsible for their safe keeping and expenditure."

Pierce's 1922 Code, provides:

> "§ 5096. The county superintendent of each county of this state may establish a circulating library for the use and benefit of the pupils of the common schools of such county.
>
> "§ 5097. At the time fixed for the levy of the county tax, the county commissioners

of each county may levy a tax sufficient to carry into effect the provisions of section one of this chapter: Provided, That said tax shall not exceed one-tenth of one mill on each dollar of the assessed valuation of the said county. The proceeds of said tax shall, when collected, constitute a circulating school library fund for the payment of all bills created by the purchase of books and fixtures by the county superintendent.

"§ 5098. The county commissioners shall allow no bill or bills against said fund until it shall have been certified to be correct by the county superintendent.

"§ 5099. The county superintendent shall purchase no books or fixtures for such circulating library until there shall be to the credit of the circulating school library fund sufficient money to pay the purchase price thereof.

"§ 5100. No book shall be placed in a county circulating library unless it has been recommended by the State Board of Education, or the Superintendent of Public Instruction.

"§ 5100a. It shall be the duty of the county superintendent to purchase the books and to enforce such rules and regulations for their distribution, use, care and preservation as he may deem necessary."

Sec. 4721 declares that:

> "The administration of the public school system shall be intrusted to a Superintendent of Public Instruction, a State Board of Education, to regents or trustees for educational institutions, to county superintendents of common schools, to boards of directors and district clerks."

Sec. 4977 provides:

> "For all actual and necessary travel in the performance of their official duties and in attendance on the convention of county superintendents, called by the Superintendent of Public Instruction, county superintendents shall be allowed actual traveling expenses."

Among the powers and duties of the State Superintendent of Public Instruction, he is required § 4724 (subdiv. 19):

> "To perform such other duties as may be required by law."

We submit that school districts do not comprise the whole public school system under the local law, that it is immaterial to the decision of this case what that local law may be, that Congress left it for the legislature to prescribe, that the legislature had plenary power and directed the County Commissioners to expend the funds in their discretion, and that the court cannot control that discretion.

CONCLUSION.

We respectfully submit that the motion and supplemental motion to dismiss the amended bill of complaint should have been granted, that the decision of the Circuit Court of Appeals should be reversed with instructions to dismiss the suit.

Respectfully submitted,

MALCOLM DOUGLAS,
Solicitor for Appellant.

HOWARD A. HANSON,
Of Counsel.

KING COUNTY, WASHINGTON, *v.* SEATTLE SCHOOL DISTRICT NO. 1.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 30. Argued April 13, 1923.—Decided December 3, 1923.

1. A suit is within the jurisdiction of the District Court as a controversy arising under the laws of the United States, Jud. Code, § 24, where the right and title set up by the plaintiff depend upon the construction of an act of Congress. P. 363.
2. The Act of Congress of May 23, 1908, directing that 25% of all money received from each forest reserve shall be paid to the State in which the reserve is situated, "to be expended as the State . . . legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated," does not create a trust, but results in a sacred obligation imposed on the public faith of the donee State. P. 364.
3. The act does not prescribe how the moneys shall be divided as between the two purposes named, but leaves this to the State. *Id.*
4. Where a state law authorizes and directs county commissioners to expend the moneys received by their county, under the above act of Congress, for the benefit of the public schools and public roads thereof, a school district has no standing to call a county to account when more of the funds are used for the one than for the other purpose, since equal division between the two is not contemplated or required by the act, and the rule that a grant to several, without specification of interests, conveys equal interests, does not apply. P. 365.

278 Fed. 46, reversed.

APPEAL from a decision of the Circuit Court of Appeals which affirmed a decree of the District Court in favor of

the School District in its suit against the County for an accounting.

Mr. Howard A. Hanson, with whom *Mr. Malcolm Douglas* was on the briefs, for appellant.

Mr. Henry W. Pennock, with whom *Mr. Dallas V. Halverstadt* was on the brief, for appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The Act of Congress of May 23, 1908, c. 192, 35 Stat. 260,[1] directs that twenty-five per cent. of all money received from each forest reserve during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the reserve is situated "to be expended as the State . . . legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated;" and it is provided that when any forest reserve is in more than one State or Territory or county the distributive share to each from the proceeds of said reserve shall be proportional to its area therein. A statute of Washington (Laws of 1907, c. 185, p. 406) directs the state treasurer to turn over to the county treasurers the amounts of such money belonging to the respective counties; and provides that "county commissioners of the respective counties to which the money is distributed are hereby authorized and directed to expend said money for the benefit of the public schools and public roads thereof, and not otherwise."

The Secretary of the Treasury paid over to the State the proper amounts for the years from 1908 to 1918, inclusive. A part of the Snoqualmie Forest Reserve is in King County, and the proportionate amounts for these

[1] See Act of March 4, 1907, c. 2907, 34 Stat. 1270.

years, aggregating $20,106.07, were turned over by the State to the county treasurer. For each of the years, 1908, 1916, 1917, and 1918, the county commissioners directed that one-half of the amount be apportioned to the county school fund and one-half to the road and bridge fund; and for each of the years from 1909 to 1915, inclusive, directed that all be assigned to the road and bridge fund. The county treasurer made the distributions as directed. Out of the total amount above mentioned, there was assigned $18,481.43 to the road and bridge fund and $1,624.64 to the county school fund. The latter is $8,428.40 less than one-half the total received by the county. The appellee is one of the school districts of the county and claims to be entitled to such proportion of one-half the amount received in each year by the county as the annual school attendance in the district bore to the total attendance in all the districts of the county. The amounts so claimed make a total of $6,789.22.

This suit was brought by the appellee, Seattle School District No. 1, to have King County and its treasurer declared to be trustees, to require them to account, and to recover the sum so claimed. The complaint set forth the facts substantially as above stated. The county moved to dismiss on the grounds that the court was without jurisdiction and that the complaint failed to state a cause of action. The motion was denied, and, the appellant declining to plead further, a decree was entered in favor of the appellee as prayed; this was affirmed by the Circuit Court of Appeals.

Section 24 of the Judicial Code provides that the district courts shall have original jurisdiction where the matter in controversy arises under the laws of the United States. In this case the right and title set up by the appellee depends upon the act of Congress. There is involved the question whether that act permits the money so received by the county to be expended by the county

commissioners as directed by state legislation, or requires an equal distribution annually for the benefit of public schools and public roads of the county. Appellee contended for the latter construction, and the courts below sustained its claim. If this is not a correct construction of the act appellee has no cause of action. See *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U. S. 526, 528; *Shulthis* v. *McDougal*, 225 U. S. 561, 569. The District Court had jurisdiction.

When turned over to the State, the money belongs to it absolutely. There is no limitation upon the power of the legislature to prescribe how the expenditures shall be made for the purposes stated, though, by the act of Congress, "there is a sacred obligation imposed on its public faith." *Cooper* v. *Roberts*, 18 How. 173, 182; *Alabama* v. *Schmidt*, 232 U. S. 168, 173; *Mills County* v. *Railroad Companies*, 107 U. S. 557, 566; *Hagar* v. *Reclamation District*, 111 U. S. 701, 713. No trust for the benefit of appellee is created by the grant. But, assuming the moneys paid over to the State are charged with a trust that there shall be expended annually one-half for schools and one-half for roads, the appellee has no right to enforce the trust. Congress alone can inquire into the manner of its execution by the State. *United States* v. *Louisiana*, 127 U. S. 182, 185–192; *Mills County* v. *Railroad Companies, supra; Emigrant Co.* v. *County of Adams*, 100 U. S. 61, 69; *Barrett* v. *Brooks*, 21 Ia. 144, 148. See also *Stearns* v. *Minnesota*, 179 U. S. 223, 231. The act does not direct any division of the money between schools and roads. Its language above quoted indicates an intention on the part of Congress that the State in its discretion may prescribe by legislation how the money is to be expended. No distribution to the appellee or any other school district is required. The public schools and public roads are provided and maintained by the State or its subdivisions, and the moneys granted by

the United States are assets in the hands of the State to be used for the specified purposes as it deems best. See *State* v. *Callvert*, 34 Wash. 58, 61.

The rule that, where a grant to two or more persons does not state the interest of each, their estates are presumed to be equal,[2] does not apply. Under the act of Congress, it was competent for the legislature of Washington to authorize county commissioners to expend the money for public schools and public roads. Equal division annually between the two purposes is not required or contemplated by the act. The appellee has no standing to object to the distributions made by the county commissioners.

The decree appealed from is reversed.